Office-Supreme Court, U.S.
FILED
JUN 20 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-25

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

WALTER GILBERTSON and CHARLES L. MILLER,

Petitioners,

vs.

JOHN M. BEVER, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

David P. Cleek
Light & Cleek
2008 Kanawha Boulevard, East
Charleston, WV 25311
(304) 343-0144
Counsel for Petitioners

47pp

QUESTIONS PRESENTED[1]

1. Whether the district court's denial of petitioner's claims of qualified immunity, which is purely a question of law, is immediately appealable under the collateral order exception to 28 U.S.C. § 1291 enunciated in Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949).

2. Whether the prohibitions set forth in Elrod v. Burns, 427 U.S. 347 (1976) clearly established rights applicable to a reduction in force in a public work force so that petitioners' immunity claim can be determined under the test enunciated in Harlow v. Fitzgerald, 457 U.S. 800 (1982).

---

[1]Pursuant to Rule 21.1(b) of the Rules of this Court, the following is a complete list of the parties in the underlying proceedings (identified as Plaintiffs or Defendants in the District Court, and as appellants or appellees in the Court of Appeals):

Plaintiffs/appellees. . John M. Bever, Clearyl Davis, John E. Ellifritt, Cecil Fling, Francis D. Radcliff, Robert W. Robinson, Michael Shepherd, Larry Williams and Larry W. Griffin,

Defendants/appellants . . John D. Rockefeller, IV., Walter Gilbertson and Charles L. Miller,

Defendants. . John Gum and Wilton Williams.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT.	3
REASONS FOR ALLOWANCE OF THE WRIT. .	17
CONCLUSION	39
APPENDIX	1A - 115A

TABLE OF AUTHORITIES

CASES	PAGE
Abney v. United States, 435 U.S. 651 (1977);	31
Abraham v. Pekarski, 537 F. Supp. 858 (E.D. Pa 1982);	36
Branti v. Finkel, 445 U.S. 507 (1980);	6, 33, 36
Butz v. Economou, 438 U.S. 478 (1978);	23
Cobbledick v. United States, 309 U.S. 323 (1940);	27
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949);	2, 15, 20, 21, 27
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978);	27
Delong v. United States, 621 F. 2d 618 (4th Cir. 1980);	19, 36
Elrod v. Burns, 427 U.S. 347 (1976);	6, 7, 11, 17, 19, 32, 33, 34, 35, 36, 37
Evans v. Dillahanty, 711 F. 2d 828 (8th Cir. 1983);	19
Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 369 (1981);	27
Forsyth v. Kleindiest, 729 F. 2d 267 (3rd. Cir. 1984);	26

Harlow v. Fitzgerald, 457 U.S. 800 (1982); 3, 4, 7, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31

Harris v. Young, 718 F. 2d 620 (4th Cir. 1983); 39

Johnson v. Bergland, 586 F. 2d 993 (4th Cir. 1978); 36

Jones v. Dodson, 727 F. 2d 1329 (4th Cir. 1984); 37

Loughney v. Hickey, 635 F. 2d 1063 (3rd Cir. 1980); 36

McSurely v. McClellan, 697 F. 2d 309 (D.C. Cir. 1982); 19

Nixon v. Fitzgerald, 457 U.S. 731 (1982); 16, 24, 30

Ramey v. Harber, 589 F. 2d 753 (4th Cir. 1978); 19, 35

Wren v. Jones, 635 F. 2d 1277 (7th Cir. 1980). 38

STATUTES

28 U.S.C. § 1254(1); 3

28 U.S.C. § 1291; 3, 4, 20

42 U.S.C. § 1983; 3, 6

42 U.S.C. § 1985; 3, 6

Chapter 17, Article 2A, Section 4 of the Code of West Virginia of 1931, as amended. 28

OTHER AUTHORITIES

Schuck, Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages, 1980 Supp. Ct. Rev. 281 (1980) 30

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Walter Gilbertson and Charles L. Miller, petitioners, hereby petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra 1A - 43A) is reported at 724 F.2d 1083; however, the order denying petitioners' request for a rehearing with suggestion for rehearing en banc on an equal division of the participating judges (App. 83A - 86A) is not yet officially reported. The district court's opinion denying petitioners' motion for summary judgment (App. 44A - 82A) is unpublished.

JURISDICTION

The district court's order denying petitioners' motion for summary judgment was entered on July 22, 1983 and was timely appealed to the United States Court of Appeals for the Fourth Circuit. By its opinion dated January 11, 1984, the court of appeals dismissed the appeal for lack of jurisdiction as it asserted that the district court's ruling on petitioners' motion for summary judgment was a collateral order not within the exceptions set forth in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1948).

Petitioners' motion for rehearing, which was supported by the United States which filed an amicus curiae brief, was thereafter denied on April 5, 1984, by an equal division of the regular active voting judges. The jurisdiction of this Court to review this case is invoked

under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issue of appealability involved 28 U.S.C. § 1291. Respondent's claims, against which petitioner asserts qualified immunity, are brought under 42 U.S.C. §§ 1983 and 1985 and are based upon the First, Ninth and Fourteenth Amendments. The texts of these Constitutional and statutory provisions are reprinted in Appendix 87A - 88A, infra.

STATEMENT OF THE CASE

This Court, recognizing the harm imposed upon government and its employees from unwarranted civil actions seeking damages individually from government officials, acting in their official capacities, reformulated the test for the qualified immunity defense in Harlow v.

Fitzgerald, 457 U.S. 800 (1982). This Court determined that, as a means of preventing trials unnecessarily when such claims are insubstantial, that the government official's entitlement to qualified immunity be resolved as a threshold matter on objective facts.

The critical issue presented for review in this case is whether the district court's pre-trial denial of a Harlow qualified immunity claim should be appealable before trial on the merits when no unresolved factual issues exist under the collateral order exception to 28 U.S.C. § 1291.

A. Factual Overview to Respondents' Claims.

In this case, three high ranking state officials, the Governor, the Commissioner of the Department of Highways and a District Engineer, with responsibility for a six county district,

have been sued for damages in their individual capacities by nine dismissed state highway employees from Doddridge County.[2] This case involved a 1981 statewide reduction in force in the Department of Highways of over 1500 persons which included the layoff of thirteen of forty-three employees in the Doddridge County unit. Three of the respondents were terminated from employment in February, 1981. The remaining six respondents were terminated from their employment in June, 1981. This case is one of nine cases currently

---

[2]There are two other defendants, neither of whom has applied for immunity, who are not petitioners in this action. One is the official who selected those employees for termination, John Gum, County Supervisor of the West Virginia Department of Highways for Doddridge County. The other is Wilton Williams, the Chairman of the Doddridge County Democratic Executive Committee. An injunctive claim for restoration to the previously held employment is included in this case.

pending in Federal District Courts in West Virginia against the Governor, the petitioners and other state officials. All these cases involve the same reduction in force and all involve claims by former employees of the Department of Highways that their individual terminations under this reduction in force, were politically motivated and based solely on their political affiliation.

The respondents here claim that they are Republicans and Independents and were terminated solely on the basis of their political affiliation in violation of 42 U.S.C. §§ 1983 and 1985, and contrary to this Court's holdings in Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980). The petitioners, through affidavits submitted to the district court which were not contested by respondents, established

that they were not personally involved in the dismissal of the respondents.

Based on this uncontroverted record, these petitioners sought qualified immunity as mandated by this Court's decision in Harlow v. Fitzgerald, supra, prior to being subjected to trial on respondents' claims for damages. Petitioners asserted that their actions do not fall within the prohibitions of Elrod, supra, and do not violate any clearly established rights of respondents. The petitioners' motion for summary judgment on a claim of qualified immunity was denied by the district court.

B. The Petitioners' Involvement In Respondents' Terminations.

In late 1980 and into 1981, the petitioner, Commissioner Miller, advised the Governor on several different occasions that the Department of Highways

faced an imminent serious fiscal crisis resulting from a shortfall in revenue collections, reductions of highway funds from the federal government and insufficient legislative appropriations to the Department. After reductions in expenditures were imposed, including cutbacks in equipment purchases and suspension of routine maintenance, a layoff of employees was ordered. A total of 1531 employees were eliminated in several reductions in force that occurred in 1981.

The petitioner, Commissioner Miller, ordered the various units of the Department, including the fifty-five county units, six districts, twenty divisions and central office staff, to initiate and implement the reduction in force. The various units, including District Four supervised by petitioner Gilbertson, were directed to make the

reductions across all units and levels of employees so as to maintain a balanced work force. As a result of this action, by a 1983 reduction in force and by normal attrition, the Department's work force has been reduced from over 7900 employees in 1979 to 5274 employees at present.

In Doddridge County, which was one of six counties supervised by petitioner Gilbertson, thirteen men out of a work force of forty-three were selected for layoff in this reduction in force. The selection of the respondents and others in Doddridge County was solely performed by John Gum, the County Supervisor and respondents' immediate supervisor, and petitioner Gilbertson relied upon Gum's selections as being within the established criteria of the maintenance of a balanced work force. The record is clear on these facts. The respondents do

not dispute the necessity of the 1981 reduction in force. They do not contradict the petitioners' assertion that John Gum selected them for termination in 1981. All the respondents question in this case is whether they, individually, were selected for their political affiliation once the decision to reduce the Department of Highways' work force was implemented.

The facts are uncontradicted that at the time Supervisor Gum was entrusted with the task of making this decision, he was thoroughly familiar with the constitutional prohibition against termination of public employees on the basis of their political affiliation. The petitioner, Commissioner Miller, pursuant to directions from the Governor in 1977, undertook to educate his staff and employees on the prohibitions against political discrimination in public

employment as established by Elrod. This educational process included meetings with district engineers and county supervisors, including Gilbertson and Gum. Petitioner Gilbertson participated in this educational process by relaying this information to his employees as well.

The petitioner, Commissioner Miller, other than to order this reduction in force and establish the selection criteria, had nothing whatsoever to do with the selection of respondents. He did not know respondents or their political affiliation. Nor did he suggest or direct that the selections be made based upon political affiliation or beliefs. With respect to petitioner Gilbertson and his participation in the selection process for the reduction in force, it is uncontradicted that he did not select respondents, that he was

unaware of all or most of their political affiliations or beliefs and that he did not suggest or direct that selections be made based upon political affiliations or beliefs. At most, he signed form letters advising respondents of their terminations. Neither of these petitioners had respondents complain or object to them after the 1981 reduction in force that the selection process was politically motivated.

C. The Denial of Petitioners' Claims of Qualified Immunity.

After extensive discovery, and based on a record which showed petitioners' only participation in respondents' terminations were the activities heretofore described, petitioners moved for summary judgment on the ground that their actions did not violate any clearly established rights of respondents and that petitioners were accordingly

entitled to qualified immunity. As part of this motion, petitioners argued that because their actions with regard to respondents' terminations were grounded on an independent legitimate justification, i.e., a fiscally-mandated reduction in force, that respondeat superior had not application for liability here, and it could not be said that petitioners had abridged in any way the constitutional rights of these respondents not to be terminated based solely upon their political beliefs.

On July 21, 1983, the district court denied petitoners' motion for summary judgment, finding that the constitutional rights of these respondents were in fact "clearly established" at the time of respondents' terminations. The district court further concluded that petitioners' claims of good faith were inappropriate for summary judgment since respondents'

allegations were sufficient to create genuine issues of material fact precluding summary judgment. The dissenting opinion below found that: "The district court's holding is incompatible with Rule 56 and mandates trial where there are mere allegations of politically motivated terminations" 724 F. 2d 1092. The district court seemed determined to find factual disputes so as to deny petitioners' motion.

Petitioners thereafter appealed the district court's rejection of the qualified immunity defense and were granted an emergency stay of trial by a single judge of the court of appeals who determined that there were "no unresolved genuine and material factual disputes" with respect to the qualified immunity defense. However, on October 7, 1983, a three judge panel of the court of appeals vacated the stay of trial and on January

11, 1984, the court of appeals, in a divided opinion, dismissed petitioners' appeal for lack of jurisdiction on the basis that the denial of petitioners' motion for summary judgment was a collateral order not within the exceptions set forth in Cohen v. Beneficial Industrial Loan Corp., supra.

The court of appeals rejected the petitioners' appeal on the jurisdictional issue. The court found that the qualified immunity claim was not a matter appealable from a final decision and did not require interlocutory appeals as an absolute immunity claim would. The court also found that a determination of the qualified immunity claim would not terminate the litigation on the basis that the injunctive relief requested could not be defended with a qualified immunity defense. Finally, the court of appeals held that this appeal did not

present a serious and unsettled question of law as the question of selective discharges of low level public employees on the basis of political affiliation was not unsettled.

The dissent was vociferous in its disagreement with the majority opinion. That dissent stated:

> "In my view, the district court's order, denying appellant's claims of qualified immunity, is precisely the type of preliminary ruling which necessitates immediate appellate review" (Emphasis added) 724 F. 2d 1089.

The dissenting opinion flatly states that in Harlow and the companion case of Nixon v. Fitzgerald, 457 U.S. 731 (1982), this Court recognized that the collateral order doctrine applies to both absolute and qualified immunity claims. If that interpretation is accurate, then the court of appeals has improperly decided this appeal.

The dissenting opinion states that if ever there was a case for the application of Harlow, this case is it. Judge Hall also discounted the simplistic injunctive relief argument of the majority and found that the Elrod case was not just clear as to these particular circumstances. Judge Hall also found the claims of respondents were insubstantial on the uncontradicted record in this case.

REASONS FOR ALLOWANCE OF THE WRIT

This case warrants review by this Court to resolve conflicting rulings among the lower courts that now threaten to undermine the defense of qualified immunity for public officials which this court took such great efforts to reformulate in Harlow to permit more claims of qualified immunity to be resolved on motions for summary judgment before trial.

The real issue presented here is whether a qualified immunity defense can provide the protection intended by Harlow if insulated from pre-trial appellate review. In this case, despite at least one judge's recognition of the insubstantiality of the claim against these petitioners, and contrary to decisions of both this Court and other courts of appeals, these petitioners are now faced with trial as a result of the court of appeal's decision to dismiss as a non-applicable interlocutory order the petitioners' appeal from the denial of their immunity claims.

A second question here involves the immunity standard which relies upon a finding of whether the public official's actions, or failure to act, have implicated "clearly established rights" of the plaintiffs. The federal courts' decisions are in confusion over this

question or at least in need of clarification. Such disputes over the meaning of Elrod have been demonstrated in decisions of this very court of appeals. Ramey v. Harber, 589 F. 2d 753 (4th Cir. 1978); Delong v. United States, 621 F. 2d 618 (4th Cir. 1980).

I. The Denial of Petitioners' Qualified Immunity Claim Was Appealable Under the Cohen Doctrine For Appealability of a Collateral Order.

If this case had arisen in the District of Columbia or Eighth Circuit, the petitioners' claims of qualified immunity would have been heard by the court of appeals. In Evans v. Dillahanty, 711 F. 2d 828 (8th Cir. 1983), the court held that absolute and qualified immunity claims are immediately appealable if the facts are not in dispute and the determination is solely a question of law. That is the case here. In McSurely v. McClellan, 697 F. 2d 309

(D.C. Cir. 1982), the court found that appellate review of denial of motions for summary judgment was available for both absolute and qualified immunity claims.

However, the court of appeals here rejected the petitioners' appeals on jurisdictional grounds. Although the majority expressed doubt that an order denying qualified immunity would ever be appealable immediately as a collateral order under Cohen v. Beneficial Industrial Loan Corp., 357 U.S. 541 (1949), it did not specifically so hold. Instead, it rejected the appeal on two technical grounds. Unfortunately, these two technical reasons will bar immediate appealability of decisions denying qualified immunity just as effectively as a blanket decision denying appealability in such cases.

The court of appeal's first basis for refusing to review petitioners'

qualified immunity claims was its conclusion that such claims are nonappealable when officials sued for damages have also been sued in their official capacities for injunctive relief, and thus will remain in the suit even if they are entitled to immunity in their personal capacities. This ruling is indefensible in that it permits clever pleaders to circumvent the Harlow shield from "insubstantial suits" for personal damages by the simple technique of adding a claim for injuctive relief.

The second rationale given by the court of appeals for dismissing the appeal in this case is that Cohen, which defines those interlocutory orders that are immediately appealable to the court of appeals under 28 U.S.C. § 1291, requires that such an order present "a serious and unsettled question". In the majority's view, the underlying issue in

this case was the ultimate legality of respondents' discharge, which could be decided by reliance on settled law. Hence the majority held that the order presented no unsettled question and was unappealable.

The protection for public officials mandated by the Supreme Court in Harlow includes protection from insubstantial lawsuits for personal damages. If the protection intended by Harlow is to be given meaning, then immediate appeals from denials of motions to dismiss or motions for summary judgment based on qualified immunity must be allowed.

The decision of this Court in Harlow involved a factual situation where the evidence against the public officials was only "inferential" after years of extensive discovery. This court insisted in Harlow that the qualified immunity standard be examined by the trial courts

so that a speedy and inexpensive resolution of "insubstantial claims" would occur without a resort to trial. As a matter of policy, the chilling effect of such lawsuits upon the willingness of responsible persons to serve in government must be thwarted. This court in Butz v. Economou, 438 U.S. 478 (1978), admonished that insubstantial lawsuits against public officials should not proceed to trial but until Harlow, the message was not clear.

That Harlow message has not been yet received by the court of appeals here. The Governor and the petitioners here and other state officials face trial after trial as a result of this decision. In Harlow, this court expressed concern over the social costs faced by public officials defending lawsuits against them which included: (1) The expense of litigation; (2) The diversion of time and

energy of public officials from public duties; (3) The deterrence of responsible persons from participation in public service; and (4) The fear that being sued would affect the unflinching discharge of official duties by public officials. The court of appeals held these factors do not apply here and speedy litigation by trial rather than appeal is the appropriate avenue.

This Court in Harlow examined both absolute and qualified immunity with respect to constitutional damage actions. In Nixon v. Fitzgerald, 457 U.S. 731 (1982), this Court held that the issue of the President's absolute immunity was an "appealable question to the court of appeals". Id at 743. This absolute immunity has been extended to judges, prosecutors, legislators and other officials who require complete protection from suit. Most governmental officials

have the lesser qualified immunity which prior to Harlow, had both objective and subjective aspects. Now the Harlow standard has made the entitlement to qualified immunity an objective standard to be determined by the objective reasonableness of the official's conduct. If that entitlement to qualified immunity under an objective standard cannot be reviewed on appeal before trial then Harlow is meaningless.

The court of appeals found that the collateral order exception has been closely confined only to situations where the claimed right would be lost or rendered impractical if immediate appellate review was not granted. The collateral order exception held the court is a narrow one and must be served only in rare cases. The court of appeals examined the elimination of the subjective aspect of the qualified

immunity claim in Harlow and agreed that this Court intended to expedite disposition of qualified immunity claims on pretrial motions but the court of appeals also stated that:

> "...but one must read much into that opinion to conclude that the Supreme Court also intended that denials of such motions should be immediately appealable" 724 F. 2d at 1088.

That holding is clearly erroneous.

The petitioners are aware that there is a reluctance to permit piecemeal appeals. In Forsyth v. Kleindiest, 729 F. 2d 267 (3rd Cir. 1984) (Forsyth II), the court interpreted Harlow as encouraging summary dispositions in insubstantial claims but not as a relaxation of the limitation on interlocutory appeals. Other pretrial matters such as discovery orders, class certification denials and refusals to disqualify counsel have been found not to

be reviewable before final judgment. Cobbledick v. United States, 309 U.S. 323 (1940), Coopers and Lybrand v. Livesay, 437 U.S. 463 (1978); Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368 (1981). Petitioners assert that this reluctance to examine pretrial rulings is misplaced on qualified immunity claims.

The point is that there is obvious contradiction and disparity between the circuit courts which must be resolved by this Court. In the Fourth Circuit, it appears that a qualified immunity claim is not effective to prevent trial on insubstantial claims but may prevent liability only. If the standard is an objective one which may be decided as a matter of law then the element of the collateral order doctrine as stated in Cohen requiring the order be "effectively unreviewable on appeal from a final judgment or so important that review

should not wait upon final judgment" is satisfied. Petitioners assert that the district court's order conclusively determined their claim of qualified immunity and thus resolved an important question independent of the subject matter of the litigation. Somehow, the court of appeals, although recognizing these elements, simply ignores them and finds that the question of qualified immunity is reviewable after final judgment. That simply is not so.

The court of appeals rejected petitioners' appeal on the grounds that: (1) the claims of qualified immunity applied to personal liability and not to injunctive claims directed at petitioners in their official capacity so a trial could not be prevented; and (2) that the case does not present a "serious and unsettled" question of law. Neither rationale justifies a circumvention of

the mandate of Harlow. It is clear in this case that the Governor and petitioner Gilbertson are not necessary for any adjudication on an injunctive claim such as reinstatement to employment. Under West Virginia law, Chapter 17, Article 2A, Section 4 of the Code of West Virginia of 1931 as amended, only the Commissioner of the Department of Highways can reinstate. In such a case, even petitioner Miller is not a necessary party at any trial as his successor could act to implement any injunctive relief granted by the court.

Professor Schuck of the Yale Law School published a study in 1980 of the effect of personal lawsuits against public officials which emphasized that such damage suits against officials, as individuals, had extremely significant detrimental effects which suits against governments or officials in their

official capacity had little negative effect. Schuck, "Suing Our Servants, The Court, Congress, and the Liability of Public Officials for Damages," 1980 S. Ct. Rev. 281. This study was cited with approval in Harlow. Chief Justice Burger in his concurring opinion in Nixon, supra, quoted Judge Hand who stated fifty-eight years ago that: "After now some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything short of sickness and death." Yet the court of appeals seems unconcerned about petitioners and other officials facing trial in this case and many other cases.

It makes no sense for a court to refuse appellate review of a qualified immunity claim because the damage claim has been joined with a claim for injunctive relief against the public official in his official capacity. The

result of this mistaken approach is to submit the same official to the costs and detrimental effects of litigation of insubstantial claims that Harlow sought to avoid.

The court of appeals has ignored the reason for the collateral order doctrine. This doctrine permits the appeal of a final decision not a final judgment. In Abney v. United States, 435 U.S. 651 (1977), this Court held a pre-trial denial of a motion to dismiss the indictment on double jeopardy grounds was immediately appealable. This Court found that rights under the Double Jeopardy Clause would be significantly undermined after conviction and sentence. This Court found that the defendant contested the very authority to hale him into court to face trial. That is precisely what the petitioners do here. The court of appeals suggests that a trial may offer

just as speedy a resolution of petitioners' claims of qualified immunity as an appeal. That approach ignores the incredible expense in time, money and personal emotional strain about to be undertaken by petitioners.

The other basis set forth by the majority of the court of appeals was that this appeal did not present serious and unsettled questions of law. The majority reasoned that since the plaintiffs' right not to be discharged solely because of their political affiliation was clearly extablished, this appeal did not present a "serious and unsettled question." There is considerable judicial confusion over the prohibitions established by Elrod which will be discussed in the next section of this petition. This appeal should have been reviewed on its merits.

II. The Elrod Decision Does Not Set Out Clearly Established Constitutional Rights Applicable to a Reduction In Force In Public Employment.

In Elrod, this Court held that the First and Fourteenth Amendments to the United States Constitution were violated by the discharge of nonpolicymaking, nonconfidential government employees solely because of their political beliefs or political affiliation. This decision found three justices joining in the opinion which held patronage dismissals placed severe restrictions on freedom of political belief and association and could be justified only in extremely limited circumstances. Two justices concurred in the opinion and held that discharges solely for political affiliation or beliefs were violative of the First Amendment. The decision in Branti v. Finkel, 445 U.S. 507 (1980), followed this principle.

Do the prohibitions mandated in Elrod set out clearly established constitutional rights applicable to the

kind of employee action, a statewide reduction in force, existing in these circumstances? If those rights are clearly established then one of the requirements for immediate appellate review of a collateral order is not present here. If those rights are not clearly established then this appeal presented serious and unsettled questions of law and should have been heard by the court of appeals. In this case, the majority found that the respondents alleged party affiliation was the sole criterion for dismissal and that the uncontradicted fiscal constraints which caused the reduction in force did not present serious and unsettled questions under Elrod.

The dissenting opinion strongly disagreed and stated as follows:

> "Whether or not Elrod applied in the instant case, where a substantial portion of

> the public employment sector had to be permanently eliminated for legitimate financial reasons, is, therefore, by no means clear and settled. Except for economic necessity, all of the plaintiffs would have remained in their DOH jobs in 1981. Thus, the applicability of Elrod to the facts of this case, and the constitutional violations which plaintiffs assert, are highly questionable and at the very least justify pre-trial review by this Court under the collateral order doctrine." 724 F. 2d at 1093.

The dissent clearly pointed out that this circuit court and several others have wrestled with Elrod and uncertainty continues with respect to Elrod's scope and applicability.

In Ramey v. Harber, 589 F. 2d 753 (4th Cir. 1978), this same court of appeals stated that:

> "The district court's decision is supported by the broad sweep of the Elrod plurality, but there is considerable uncertainty as to how a majority of the Supreme Court would treat a failure to rehire

and other patronage practices."
589 F. 2d at 757.

In two other decisions, DeLong v. United States, 621 F. 2d 618 (4th Cir. 1980) and Johnson v. Bergland, 586 F. 2d 993 (4th Cir. 1978), several judges expressed concern over the interpretation of Elrod.

This unsettled state is not confined to this circuit. Judge Aldisert of the Third Circuit stated in his concurring opinion in Loughney v. Hickey, 635 F. 2d 1063 (3rd. Cir. 1980), that: "I suggest that the various opinions in both Elrod and Branti are not capable of public comprehension". In Abraham v. Pekarski, 537 F. Supp. 858 (E. D. Pa. 1982), the court observed that few decisions of this court have generated as much litigation as Elrod and Branti because of the lack of the majority opinion in Elrod.

The most recent expression of this unsettled judicial state was over the

interpretation of Elrod was in Jones v. Dodson, 727 F. 2d 1329 (4th Cir. 1984) decided only four months ago but after this case. In Jones, a claim of discharge based upon political affiliation in a sheriff's office was examined by the Fourth Circuit. In Jones, the Court held:

> "These cross-appeals raise difficult constitutional and procedural issues growing out of the claims of two public employees that they have been discharged in violation of first amendment rights. The difficulty is compounded by the fact that controlling doctrine - both substantive and procedural - is still evolving and is by no means yet authoritatively settled in all its critical aspects." 727 F. 2d at 1333.

The court of appeals here has ignored the reality of the uncertainty present in its own decisions in this case.

In 1981, more than 1500 persons were laid off from the Department of Highways

in a reduction in force necessitated by an undisputed fiscal crisis in state government. Neither petitioner here actually chose those individuals, including respondents, selected in this reduction. Neither petitioner encouraged or directed any selection process that included a factor of political affiliation. In fact, both gave directions that the selection, which was to be made by local on line supervisors who possessed the appropriate information, was to be made so as to maintain a balanced work force. Petitioners deny that the termination of respondents was based solely on political affiliation but was necessitated by a fiscal crisis. In that setting, there may be not clearly established constitutional rights. See Wren v. Jones, 635 F. 2d 1277 (7th Cir. 1980).

The issue here is whether the

petitioners' lawful acts in a fiscal crisis could violate a clearly established right of respondents not to be terminated solely for political reasons. The court of appeals in this case was unable to answer this issue unanimously and conclusively. Under Harris v. Young, 718 F. 2d 620 (4th Cir. 1983), the inability of the court to unanimously decide the qualified immunity issue is sufficient to support a holding that these petitioners are immune or allow appellate review.

CONCLUSION

The issues raised by the petition deserve review and consideration. The writ sought should be granted.

Respectfully submitted,

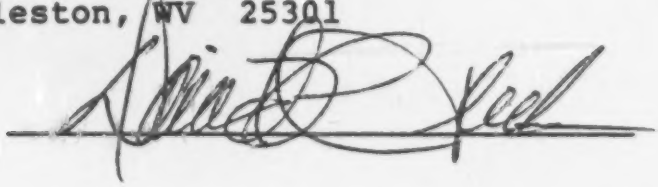
DAVID P. CLEEK
Counsel for Petitioners
2008 Kanawha Blvd., East
Charleston, WV 25311

CERTIFICATE OF SERVICE

I, DAVID P. CLEEK, Counsel for Petitioners, do hereby certify that three (3) true copies of the foregoing Petition for Writ of Certiorari were served upon counsel for Respondent by depositing said copies in the United States mail with first-class postage prepaid on the ____ day of July, 1984, addressed as follows:

Guy R. Bucci, Esquire
1514 Charleston National Plaza
P.O. Box 3712
Charleston, WV 25337

Timothy N. Barber, Esquire
12 Capitol Street
Charleston, WV 25301



84-25

Office-Supreme Court, U.S.
FILED
JUN 20 1984
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

WALTER GILBERTSON and CHARLES L. MILLER,

Petitioners,

vs.

JOHN M. BEVER, et al.

Respondents.

APPENDIX

David P. Cleek
Light & Cleek
2008 Kanawha Boulevard, East
Charleston, WV 25311
(304) 343-0144
Counsel for Petitioners

117pp

APPENDIX
TABLE OF CONTENTS

Appendix A: Opinion of the United States Court of Appeals for the Fourth Circuit 1-A

Appendix B: District Court Opinion Denying Petitioners' Motions for Summary Judgment 44-A

Appendix C: Order of the United States Court of Appeals for the Fourth Circuit Denying a Rehearing 83-A

Appendix D: Judgment Order of the United States Court of Appeals for the Fourth Circuit 85-A

Appendix E: Constitutional Provisions and Statutes Involved 87-A

Appendix F: Affidavit of Governor Rockefeller 91-A

Appendix G: Affidavit of Charles L. Miller 103-A

Appendix H: Affidavit of Walter Gilbertson 112-A

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1790

John M. Bever, Clearyl Davis,
John E. Ellifritt, Cecil Fling,
Drexeline Perrine, Francis D.
Radcliff, Robert W. Robinson,
Michael Shepherd, Larry Williams
and Larry W. Griffin, Appellees,

versus

Walter Gilbertson and
Charles L. Miller, Appellants,

and

John Gum, Wilton Williams,
individually and as
Commissioner of the West Virginia
Department of Highways; and
John D. Rockefeller, IV,
individually and as Governor of
the State of West Virginia, Defendants.

No. 83-1791

John M. Bever, Clearyl Davis,
John E. Ellifritt, Cecil Fling,
Drexeline Perrine, Francis D.
Radcliff, Robert W. Robinson,
Michael Shepherd, Larry Williams
and Larry W. Griffin, Appellees,

versus

John D. Rockefeller, IV., Appellant,

and

John Gum, Walter Gilbertson,
Wilton Williams, Charles L. Miller,
individually and as Commissioner
of the West Virginia Department
of Highways, Defendants.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston, Charles H. Haden, II, District Judge, 82-2506

Argued October 5, 1983
Decided January 11, 1984

Before WINTER, Chief Judge, HALL, Circuit Judge, and HAYNSWORTH, Senior Circuit Judge

---

Robert B. King (Rebecca A. Betts, King, Betts & Allen on brief) for Appellant John D. Rockefeller, IV; David P. Cleek, Deputy Attorney General (Chauncey H. Browning, Attorney General; Edward W. Eardley, Steptoe & Johnson on brief) for Appellants Charles L. Miller and Walter L. Gilbertson; Timothy N. Barber (Guy R. Bucci on brief) for Appellees.

HAYNSWORTH, Senior Circuit Judge:

In 1981, West Virginia's Department of Highways allegedly was confronted with the need to substantially cut its expenditures. It chose to terminate the employment of a large number of lower echelon employees. According to plaintiffs, the sole or principal criterion for the selection of those to be terminated was political party affiliation. Loyal Democrats were to be retained while Republicans and Independents were to be terminated.

There are now pending in the Northern and Southern Districts of West Virginia a number of cases brought by terminated employees of the Department of Highways alleging that their terminations were in violation of their constitutional rights of free association. The plaintiffs in this case are such

terminated employees who worked under the supervision of John Gum, County Supervisor for the Department of Highways in Doddridge County. The defendants are Governor John D. Rockefeller, IV, Charles L. Miller, Commissioner of West Virginia's Department of Highways, Walter Gilbertson, District Engineer of District 4 of the Department of Highways, Gum and Wilton Williams, Chairman of Doddridge County Democratic Executive Committee. The amended complaint sought injunctive relief, including reinstatement of the plaintiffs to their former jobs, and damages. Governor Rockefeller, Commissioner Miller and District Engineer Gilbertson were sued both in their official and individual capacities, and they claim qualified immunity from the claim of damages against them personally. The immunity claim was the basis of a motion for summary judgment. The motion

was denied by the district judge largely on the basis that those defendants could not reasonably have believed that a political criterion for the selection of those employees whose employment was to be terminated was permissable under the Constitution of the United States.

Those three defendants sought a certificate by the district judge for a permissable interlocutory appeal under 28 U.S.C.A. § 1292(b). The district judge refused such certificaation, whereupon those three defendants filed notices of appeal under 28 U.S.C.A. § 1291. The question now before us, upon a motion to dismiss the appeals, is whether these appeals are within the collateral order exception to the general rule that appeals of right are allowable only from final judgments.

I.

As developed in Cohen v. Beneficial

Loan Corp., 337 U.S. 541, and subsequent cases in the Supreme Court, an appeal from an interlocutory order under § 1291 may be taken, if the interlocutory order conclusively determines the question in the trial court, resolves an important question independent of the subject matter of the litigation, is effectively unreviewable on appeal from a final judgment or so important that review should not wait upon final judgment, and presents a serious and unsettled question upon appeal.

In Cohen itself, the plaintiffs were small shareholders who brought a derivative stockholders' action within the diversity jurisdiction of the federal courts. The defendants, faced with the prospect of large litigation expenses, sought an order compelling the plaintiffs to post security for them under a state statute which required the plaintiffs to

reimburse the defendants for such expenses in the event that the defendants prevailed. The district court denied the motion to compel the posting of such security.

It is obvious that in Cohen, if an immediate appeal was not available and the case proceeded to final judgment, the defendants would have lost irretrievably the security they sought to gain by the motion, and the purpose of the statute imposing the burden of costs upon the losing plaintiffs would have been substantially frustrated.

Orders denying claims of absolute immunity have been held within the Cohen collateral order exception. In Helstoski v. Meanor, 442 U.S. 500 (1979), the claim was one of immunity under the Speech and Debate Clause. In Abney v. United States, 431 U.S. 651 (1977), the claim was one of immunity under the Double

Jeopardy Clause, while in Nixon v. Fitzgerald, 457 U.S. 731 (1982), the claim was one of absolute immunity for the President of the United States.

Claims of absolute official immunity are rightfully classified with claims of immunity under the Double Jeopardy Clause and the Speech and Debate Clause. In each instance, an important aspect of the absolute immunity with which the person is clothed is that he not be put to trial at all, and the right not to be put to trial at all is irrevocably lost if an order putting such person to trial may not be reviewed until after final judgment.

The qualified immunity, with which the three appellants are cloaked, is of a lower order. It provides substantial protection for a public official who acts under circumstances in which a reasonable person would believe that his conduct did

not violate established constitutional rights of another. That such a defendant not be put to the trouble of defending himself on the merits is also an aspect of immunity. Indeed, in Harlow v. Fitzgerald, 457 U.S. 800, the Supreme Court sought to give additional protection against being put to trial on insubstantial claims to persons possessing qualified immunity. It eliminated the subjective aspect of the qualified immunity doctrine as theretofore understood so that more claims of qualified immunity could be resolved on motions for summary judgment before trial.

It is far from clear, however, that an order denying a claim of qualified immunity is within the collateral order exception. While the Supreme Court in Harlow v. Fitzgerald considered the contours of qualified immunity, the case

got there because the order in the district court denied Harlow's claim of absolute immunity. See, note 11, 457 U.S. at 806. In McSurely v. McClellan, 697 F. 2d 309 (D.C. Cir. 1982), the court held that an order denying a claim of qualified immunity was within the collateral order exception, a position with which a panel of this court (Judges Hall, Murnaghan, and Haynsworth) differed in an unpublished opinion in Benford v. American Broadcasting Companies, Inc., (No. 83-1168, 1983).

Whatever the situation might be in other circumstances, however, the qualified immunity claimed by these three appellants cannot prevent their being put to trial. The plaintiffs seek equitable relief as well as money damages, and the appellants have no immunity from being

put to trial on the equitable claims.[1] They are the principal defenders of the state's position. They will bear a major responsibility for the outcome of the

---

1. Our dissenting brother suggests that Governor Rockefeller and District Engineer Gilbertson were not proper parties to this action insofar as injunctive relief is sought. If reinstatement were the only equitable remedy sought, complete relief might be obtainable if Highway Commissioner Miller, or his successor, was the only named defendant, but the plaintiffs also seek an injunction prohibiting all defendants from conspiring to violate plaintiffs' constitutional right to be free of discrimination in employment based entirely upon political party considerations. Commissioner Miller serves "at the will and pleasure of the Governor" W.Va. Code 6-7-2A, and is vulnerable to pressure from the Governor. Commissioner Miller is responsible for "the selection, employment, and effective organization of all Commission personnel --" W.Va. Code 17-2A-4. Doubtless it is he who sets broad policy, but he may act only through subordinates, such as District Engineer Gilbertson, who either makes specific personnel decisions within the guidelines set by the Commissioner or who, at least, may make recommendations to the Commissioner. We conclude that Governor Rockefeller and Engineer Gilbertson are proper parties insofar as injunctive relief is sought.

litigation and will be among the principal witnesses at the trial. Whether or not they are immune from an assessment of damages against them in their individual capacities, the litigation will demand their time and attention. A present declaration of immunity from damage claims cannot avoid the diversion of their attention from other official duties which the litigation will occasion.

If the personal pocketbooks of the three appellants are, or may be, at risk, the degree of their distraction from other official duties may be greater than it otherwise would be. Still, one would suppose that, if the risk of personal liability were eliminated, the three, as responsible public officials, would give the litigation all of the thought and attention necessary adequately to protect the interest of the state.

The doctrine of qualified immunity cannot protect a public official from a claim of personal liability. It may provide a means by which the litigation may be terminated sooner than it otherwise might be, and it provides the official with substantive protection against personal liability for official wrongs other then a violation of established constitutional rights. In this case, however, a trial had been scheduled, and, if these appellants had nothing to do with the selection process and bore no responsibility for it, as they claim, they might have obtained a favorable judgment on the claims against them individually sooner by a trial on the merits than by appellate litigation of their immunity claims.

In these circumstances, the question whether a denial of the immunity claims is appealable before trial and final

judgment, would appear to have little effect upon the willingness of responsible persons to serve in public office. That is one of the reasons for the existence of the doctrine of qualified immunity, and a claim of personal liability on the part of a public official should be adjudicated with reasonable promptness. Here, however, trial on the merits is at hand, and the appellants can look forward to prompt vindication of their positions if they are correct in their claims that they were not participants in the selection process and were not otherwise responsible for it.

If the question of qualified immunity is still in the case after final judgment in the district court, it may readily be reviewed in an appeal from that judgment.

Generally, in the Supreme Court the

collateral order exception has been confined to situations in which the claimed right would be lost or deprived of its practical value if immediate review is not provided. This is true in absolute immunity cases in which the defendant is entitled not to be put to trial. Other preliminary orders of great importance to the litigants have been held not within the doctrine. Pretrial discovery orders may not be reviewed before final judgment. Cobbledick v. United States, 309 U.S. 323 (1940), and United States v. Ryan, 402 U.S. 530 (1971). An order denying class certification is not within the doctrine. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). Nor is an order refusing to disqualify counsel. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981). Litigants may desire early appellate rulings on important orders of

that sort, but the collateral order exception is a narrow one and reserved for rare cases. Such a one was Mercantile National Bank. v. Langdeau, 371 U.S. 555 (1963), where the question was one of venue in protracted litigation against two national banks which asserted a right not to be put to trial at all in the court in which the action had been brought. The question of venue is subject to appellate review after final judgment, but the court was moved by the specter of the great waste that would occur if the extensive litigation were permitted to proceed in the wrong court.

There are no comparable circumstances here. There is no problem of jurisdiction or venue in the district court. The trial must proceed in any event, and the question of qualified immunity is readily subject to appellate review after final judgment.

In the lower federal courts, orders denying claims of absolute immunity have been held appealable before trial. Chavez v. Singer, 698 F. 2d 420, 421 (10th Cir. 1983); Forsyth v. Kleindienst, 599 F. 2d 1203, 1208-1209 (3d Cir. 1979), cert. denied, 453 U.S. 913 (1981) (Forsyth I); Forsyth v. Kleindienst, 700 F. 2d 104 (3d Cir. 1983) (Forsyth II. In Forsyth I, an interlocutory appeal from an order denying a claim of qualified immunity was not allowed, and the court said it was not even seriously contended that those orders met the Cohen requirements. In Forsyth II, the majority expressed skepticism about the appealability of the denial of summary judgment on the claim of qualified immunity referring to the Supreme Court's decision in Harlow v. Fitzgerald and the decision of the United States Court of Appeals for the District of Columbia

Circuit, mentioned above, in McSurely v. McClellan. By eliminating the subjective component of the qualified immunity claim, the Supreme Court clearly intended to facilitate disposition of claims of qualified immunity on summary judgment motions, but one must read much into that opinion to conclude that the Supreme Court also intended that denials of such motions should be immediately appealable. If, however, it may ultimately be determined that such an order is immediately appealable if the effect of the immunity claim would be to terminate the litigation insofar as the immune defendant is concerned, this case is different. Partial summary judgment for these appellants on the damages claims against them individually would not terminate the litigation nor avoid the necessity for a trial and active participation in it by these appellants.

Under these circumstances, we cannot read Harlow v. Fitzgerald as a basis for a conclusion that this denial of summary judgment meets the Cohen requirements.

II.

There is another reason for dismissal of this appeal as premature.

One of the requirements for immediate appealability of a collateral order under the Cohen doctrine is that it presents a serious and unsettled question of law. A public official, clothed with qualified immunity, is not required to anticipate future development of constitutional doctrine, but he is required to respect the established constitutional rights of others. His qualified immunity is not available to him if he does not do that.

In 1981, when these plaintiffs were terminated as employees of the Department of Highways, their constitutional right

not to be discharged solely because of their political affiliation was clearly established. Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980). The plaintiffs were not confidential employees nor policy makers. Indeed, there is no contention here that they are not the kind of employees who enjoy the protection of the Elrod-Branti principle.

Instead, the defendants contend that their discharge was not solely because of the lack of affiliation with the Democratic Party. It was for economic reasons, they say.

We may accept the fact that in 1981 fiscal considerations made a reduction in force in the Department of Highways necessary or appropriate. The decision that a reduction in force is necessary, however, was only a backdrop. It did not identify those employees to be terminated

or those to be retained. It only set the stage for those specific employment decisions which would identify those employees who were to be released and would effect their actual terminations. The Elrod-Branti principle fully protected all of the lower echelon employees of the Department as their superiors approached the task of implementation of the reduction in force.

It is true that in both Elrod and Branti the patronage system had been operating to procure the discharge of members of an unfavored party to replace them with members of a favored party. Proof that the discharges were solely for political purposes may be facilitated when there are immediate replacements by members of a favored party, but the Constitution protects the rights of existing employees against discharge solely for political reasons. If, in the

implementation of a reduction in force, those employees to be released are selected not on the basis of the quality of their work, their productivity or their faithfulness to their jobs but solely on the basis of their political affiliations. the Elrod-Branti principle is clearly applicable. The plaintiffs' allegations bring them readily within the principle.

The defendants place major reliance on Wren v. Jones, 635 F. 2d 1277 (7th Cir. 1980), but that case is of no assistance to them. In that case, a court had ordered the reinstatement of a number of Democrats who had been discharged solely for political reasons. The affected departments of the State of Illinois discharged a number of Republicans in order to make room for the Democrats to be reinstated. Considerations of fiscal limitations and

efficiency militated strongly against the employment of both groups. In that case, however, the pool from which the employees to be terminated were selected was composed entirely of Republicans. Republican affiliation was not the criterion of selection, and it was properly concluded that economic necessity was the reason for their termination.

Wren is thus nothing like this case where the allegation is that party affiliation was the sole criterion by which these plaintiffs were selected for discharge. At least so far, this is not a mixed motive case. Economic considerations may have occasioned the reduction in force. They did not dictate, or even address, the political criterion by which those to be discharged allegedly were chosen.

III.

Because this collateral order is not within the Cohen exception to the rule that appeals of right may be taken only from final judgments, the appeal is dismissed.

APPEAL DISMISSED

HALL, Circuit Judge, dissenting:

I cannot accept the majority's dismissal of these appeals as interlocutory. In concluding that pretrial review is unavailable, the majority has ignored both the facts of this case and applicable law. In my view, the district court's order, denying appellant's claims of qualified immunity, is precisely the type of preliminary ruling which necessitates immediate appellate review. For this reason, I must dissent.

I.

This case is one of nine civil actions currently pending against West Virginia's Governor Rockefeller, Department of Highway (DOH) Commissioner Miller, and various DOH District Engineers for their alleged participation in a conspiracy to terminate some sixty former DOH employees for political

reasons. In this case, as in the others, plaintiffs are Republicans and Independents, who seek to hold Governor Rockefeller, a Democrat, and other state officials personally liable for monetary damages. The state defendants deny that they are liable for damages because of their entitlement to qualified or "good faith" immunity.

In the proceedings below, Governor Rockefeller, Commissioner Miller, and District Engineer Gilbertson moved for summary judgment based on their official immunity. The parties agree that the matter was ripe for summary disposition and that no facts regarding the immunity claim remain unresolved. According to the uncontradicted evidence neither Governor Rockefeller nor the other two appellants were personally involved in the selection of these nine plaintiffs for termination. Moreover, the record

also clearly establishes that none of the three at any time considered, suggested, authorized, or otherwise intended that the terminations be politically motivated. Finally, as plaintiffs concede, it is clear that the terminations arose as a result of an economically necessitated reduction in force.[1/] Notwithstanding these undisputed facts, the district court denied the motions for summary judgment and these appeals followed.

In my view, the majority erroneously holds that the appeals from the denial of summary judgment must await the outcome

---

1/ The record in this case demonstrates that because of the state's fiscal crisis in late 1980, over 1,500 DOH employee positions were eliminated in 1981, the year of plaintiff's terminations. As of now, more than 2,600 DOH employees have lost their jobs since the end of 1980. This represents an elimination of approximately one-third of the DOH workforce as it existed in late 1980.

of the trial. Under 28 U.S.C. § 1291 only appeals from final judgments are ordinarily permitted. Nevertheless, as the majority notes, an exception to this general rule, known as the collateral order doctrine, has been recognized by the Supreme Court in Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949), and other cases. To fall within the collateral order exception, the order appealed from must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; (3) be effectively unreviewable on appeal from a final judgment; and (4) present a serious and unsettled question on appeal. In the companion cases of Nixon v. Fitzgerald, 457 U.S. 731 (1982), and Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court recognized the applicability of the collateral order

doctrine to both absolute and qualified immunity claims and the need for pre-trial appellate review of the denial of such claims. Other Circuit Courts, applying Harlow, have affirmed the appropriateness and need for immediate review of official immunity claims. Chavez v. Singer, 698 F. 2d 420, 421 (10th Cir. 1983); McSurely v. McClellan, 697 F. 2d 309, 316 (D.C. Cir. 1982); Forsyth v. Kleindienst, 599 F. 2d 1203, 1208-1209 (3d Cir. 1979), cert. denied, 453 U.S. 913 (1981) (Forsyth I); Forsyth v. Kleindienst, 700 F. 2d 104 (3d Cir. 1983) (Forsyth II). The majority, however, has concluded that Harlow is not controlling and that these appeals do not meet the four criteria of the collateral order exception to 28 U.S.C. § 1291. I disagree. In my opinion, if ever there was a case which justified application of Harlow and the collateral order doctrine,

this is certainly the one.[2/]

II.

Official immunity has long been recognized as a concept essential to the effective functioning of government.

[2/] The majority's reference to the unpublished decision in Benford v. American Broadcasting Companies, Inc., et al., No. 83-1168 (4th Cir., April 11, 1983), in no way deters me from finding Harlow applicable in this instance. The two cases are factually distinct. In Benford, we simply held that an immediate appeal of the district court's order denying summary judgment was not warranted when the qualified immunity defense was not finally determined and where the disappointed movants could still present facts at trial in support of their claim to immunity. In that case, the district court ruled that the Congressional staff defendants had acted beyond the scope of their authority and, therefore, lacked standing to assert a qualified immunity defense; however, in deciding against the Congressional defendants, the district court left open the possibility that they could prove certain facts at trial which would entitle them to qualified immunity. Here, on the other hand, all of the facts pertaining to the qualified immunity defense asserted by Governor Rockefeller and the other state officials have been presented and the district court has conclusively resolved their immunity claims against them.

Butz v. Economou, 438 U.S. 478 (1978). As noted by the Supreme Court in Scheuer v. Rhodes, 416 U.S. 232, 239 (1974), officials, including a state's chief executive officer and his aides, must be permitted "to perform their official functions free from the threat of suits for personal liability." The Supreme Court in Harlow expressed its frustration with the increasing burdens imposed on public officials in defending against "insubstantial claims" and made clear that suits brought against public officials for alleged constitutional torts should be screened at the earliest stages of litigation:

> In Butz, we admonished that "insubstantial" suits against high public officials should not be allowed to proceed to trial. 438 U.S., at 507. . . . We reiterate this admonition. Insubstantial lawsuits undermine the effectiveness of Government as contemplated by our constitutional structure, and

> firm application of the Federal Rules of Civil Procedure" is fully warranted in such cases. Id., at 508.

457 U.S. at ____, 102 S.Ct. at 2739, n. 35.

Accordingly, the Supreme Court departed from the earlier requirement that in order to be entitled to qualified immunity an official must show both objective and subjective good faith. Under Harlow, it is sufficient for purposes of good faith immunity if the conduct in question did not violate clearly established rights which a reasonable person would have known. In recasting this standard, the Harlow Court noted:

> (I)t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty - at a cost not only to the defendant officials, but to the society as a whole (footnote omitted). These social costs include the expenses of

> litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible (public officials), in the unflinching discharge of their duties." Gregiore v. Biddle, 177 F. 2d 579, 581 (CA 2 1949), cert. denied 339 U.S. 949 (1950).

457 U.S. at ____, 102 S.Ct. at 2736.

As the District of Columbia Circuit held in McSurely, the Supreme Court in Harlow "consciously sought to facilitate summary disposition of insubstantial claims against governmental officials. Consequently, . . . appellate review of a denial of a motion for summary disposition must be available to ensure that government officials are fully protected against unnecessary trial under qualified immunity on the same basis as for absolute immunity." 697 F. 2d at 316. Similarly, the Third Circuit in

Forsyth II, 700 F. 2d at 105, stated that a claim of absolute immunity". . . protects a right not to be subjected to trial - a right that is lost if appellate review awaits final adjudication. If follows, therefore, that a stay (of the trial) must be granted or the defendant will be deprived of the benefits of adjudication before trial."

The majority, however, rejects the McSurely and Forsyth II analysis. It stresses in Part I of its opinion that, because plaintiffs seek reinstatement to their former jobs as well as damages, appellants must proceed to trial in any event, and, therefore, the denial of immediate appellate review does not result in an irretrievable loss to appellants. This mistaken view ignores

the fact that neither Governor Rockefeller nor District Engineer Gilbertson are proper parties for injunctive relief.[3/] Furthermore, the majority's holding can easily lead to the pernicious practice of tacking on a claim for injunctive relief in order to avoid summary judgment and force officials to go to trial on meritless damages actions. In an appropriate case, the majority's rationale might have merit. It can have no application, however, in a case such as this, where public officials are contesting the right to be haled into Court in their personal capacities[4/] and face trial on what is clearly an insubstantial claim for damages.[5/]

[3/] Under W.Va. Code § 17-2A-4 (1983), only Commissioner Miller has the authority to order reinstatement.

[4/] The majority concludes that it makes no difference whether the personal pocketbooks of appellants are at risk or

(footnotes 4 and 5, continued)
not insofar as their distraction from official duties is concerned. This position, however, completely overlooks the fact that an official being sued personally for money damages may be required to retain private counsel at his own expense. Furthermore, the fear of being sued and held personally liable for damages is a far cry from a suit for reinstatement or injunctive relief, which public officials face regularly in the course of performing their duties. As the Supreme Court noted in Harlow, 457 U.S. at ____, 102 S.Ct. at 2736, 2738, the threat of personal liability could deter all but the most resolute or irresponsible from discharging their public duties, or even from being willing to serve in public office.

5/ A review of the current state of the record quickly reveals the insubstantiality of plaintiffs' claim. Plaintiffs allege that appellants participated in a scheme to oust them from their jobs for political reasons, of that appellants knew, or should have known, that the terminations were illegal and did nothing to prevent them. These allegations, however, when submitted to the test of appellants' motions for summary judgment, are not supported by a single shred of evidence, and the majority cites none.

Appellants' affidavits substantiate their defense that the terminations were due to financial necessity and indicate that none of the appellants had any personal involvement whatsoever in plaintiffs' selection for discharge by another defendant, County Supervisor John

(footnote 5, continued)
Gum. That plaintiffs were discharged solely by Gum, and without consultation, is further supported by Gum's deposition, in which he stated that he alone made the decision to terminate plaintiffs.

None of plaintiffs' submissions, in response to these affidavits and supporting documentation, in any way contradict appellants' evidence. In fact, one of plaintiffs' submissions, a deposition taken of Governor Rockefeller in connection with other litigation, reveals that political hiring and firing was specifically disavowed by the Rockefeller administration. It further demonstrates that 55% of the DOH employees terminated in 1981 were persons hired by Governor Rockefeller's administration, while only 38-39% of those terminated were persons hired by the former Republican administration.

I am thus at a loss to understand the district court's rationale for allowing the damages claim to proceed to trial on the ground that "(p)laintiffs' response . . . sets forth allegations which if assumed to be true for the puroses of this motion preclude summary judgment." Under Fed. R. Civ. P. 56 (e), once a motion for summary judgment is made, "an adverse party may not rest upon the mere allegations or denials of his pleading." The rule requires the responding party to set forth specific facts showing that there is a genuine issue for trial or else have summary judgment entered against him. The district court's holding is incompatible with Rule 56 and mandates trial where there are mere allegations of politically motivated terminations. By dismissing these appeals, the majority seems to sanction this unwarranted practice.

motivated at least in part by a fiscal crisis, is open to serious question.

As recognized in Abraham v. Pekarski, 537 F. Supp. 858, 863-64 (E. D. Pa. 1982):

> Few Supreme Court decisions in recent years have generated as much litigation and controversy as have Elrod and Branti. Moreover, because of the lack of a majority opinion in Elrod, a problem not cured by Branti, the sweep of Elrod and Branti has been subject to a good deal of critical analysis seeking to assess their reach (footnotetes omitted).[6/]

The decisions of our own Court reflect the continued uncertainty surrounding Elrod's scope and applicability. In Ramey v. Harber, 589

6/ Judge Aldisert of the Third Circuit Court of Appeals made the following observation in his concurring opinion in Loughney v. Hickey, 635 F. 2d 1063, 1069 (3d Cir. 1980): "I suggest that the various majority opinions in both Elrod and Branti are not capable of public comprehension."

F. 2d 753 (4th Cir. 1978), cert. denied, 442 U.S. 910 (1979), this Court noted the factual distinctions between that case, which involved a newly elected sheriff's failure to rehire deputies who had actively campaigned against him, and the Elrod case. Although the majority found it unnecessary to determine the applicability of Elrod to the Ramey facts, it nonetheless expressed its reservations in this regard: "The district court's decision is supported by the broad sweep of the Elrod plurality, but there is considerable uncertainty as to how a majority of the Supreme Court would treat a failure to rehire and other patronage practices." 589 F. 2d at 757.[7/]

7/ Other decisions in this Circuit which reflect the continuing uncertainty over the scope of Elrod include: Delong v. United States, 621 F. 2d 618, 625 (4th Cir. 1980) (Dumbauld, J., concurring:

Courts in other Circuits have also wrestled with the meaning of Elrod. In spite of the majority's view that the Seventh Circuit's decision in Wren v. Jones, 635 F. 2d 1277 (7th Cir. 1980), cert. denied, ____ U.S. ____, 102 S. Ct. 129 (1981), is of no aid to appellants, I find that case instructive. In Wren, the Seventh Circuit was called upon to weigh the fiscal interest of the State against the Elrod rights of public employees in Illinois. In this connection the Wren Court held that "(i)n view of the involuntary requirement that (certain)

(footnote 7, continued)

"appellant's situation does not fall within Elrod. He has not been discharged, or threatened with discharge. He has simple been transferred. . ."') and Johnson v. Bergland, 586 F. 2d 993, 996 (4th Cir. 1978) (Hall, J., dissenting: ". . . the majority's reliance on Elrod v. Burns . . . is misplaced; there the infringement of first amendment rights was direct and immediate, not indirect and speculative.")

plaintiffs be reinstated, and of the fiscal exigencies, . . . the State's interest in maimtaining prudent control over the efficient use of their (sic) resources outweighs any minimal impact on the plaintiffs" right to political association." Id. at 1287. (emphasis added).

Whether or mot Elrod applies in the instant case, where a substantial portion of the public employment sector had to be permanently eliminated for legitimate financial reasons, is, therefore, by no means clear and settled. Except for economic necessity, all of the plaintiffs would have remaimed in their DOH jobs in 1981. Thus, the applicability of Elrod to the facts of this case, and the constitutional violations which plaintiffs assert, are highly questionable amd at the very least justify pre-trial review by this Court

under the collateral order doctrine.

IV.

The majority's denial of pre-trial review under the circumstances presented in this case flies in the face of Harlow and conflicts with decisions by other Circuit Courts which have allowed immediate review of the denial of official immunity claims. As a result, appellants have had their claims to qualified immunity conclusively resolved against them. They have irretrievably lost whatever claim they may have to official immunity, not only in this case, but possibly in the eight other related cases now pending against Governor Rockefeller, Commissioner Miller, and other District Engineers like Gilbertson. Denying appellate review irreparably harms not only these public officials, but also the public at large and the very concept of official immunity.

For the foregoing reasons, I would hold that we have jurisdiction of these appeals under the collateral order doctrine and would address the immunity claims on their merits.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA

CHARLESTON

JOHN M. BEVER, et al,

Plaintiffs,

vs. CIVIL ACTION NO. 82-2506

JOHN GUM, et al,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon numerous dispositive motions by Defendants Gum, Gilbertson, Miller[1] and Rockefeller. Certain of the motions challenge Plaintiffs' original complaint, which has since been superseded by the amended complaint filed March 28, 1983. Certain other motions have been rendered moot by this Court's continuance of the

---

[1] Defendants Gum, Gilbertson and Miller are jointly represented.

injunction hearing previously scheduled for March 7, 1983. One motion is unopposed. Remaining are four dispositive motions post-dating the amended complaint, which are opposed by Plaintiffs. These latter four motions substantially overlap; two were submitted on behalf of Defendant Rockefeller, two were submitted by the Defendants, Gilbertson and Miller. Prior to reviewing the substance of these motions, the Court deems it appropriate to summarize the events of this litigation from its inception to the present time.

Plaintiffs originally brought this action in the Circuit Court of Kanawha County, West Virginia. Subsequently, Defendants filed a petition for removal[2]

---

[2] All Defendants were at that time jointly represented by the Attorney General of West Virginia and counsel for the state insurance carrier.

pursuant to 28 U.S.C. § 1441; Plaintiffs responded by moving to remand the case back to Kanawha County. By Order entered November 17, 1982, this Court held that, since the action had been properly removed under the provisions of 28 U.S.C. § 1446, and since federal question jurisdiction existed, the Court had no discretion to remand. Discovery then commenced in anticipation of the March 7, 1983, injunction hearing.

Redress is sought in this action for the alleged deprivations of Plaintiffs' right to free political association and affiliation, which they contend occurred under a system of political patronage in effect within the Department of Highways (DOH), and specifically in Doddridge County, West Virginia. The alleged "political firing" of the ten Plaintiffs, all registered Republicans, was said to have been perpetrated by Defendants under

the democratic administration of West Virginia Governor John D. Rockefeller, IV. Three of the remaining Defendants, John Gum, Walter Gilbertson and Charles L. Miller, were supervisory officials of the DOH during the period in question; Defendant Wilton Williams was democratic committee chairman of Doddridge County, West Virginia, the situs of Plaintiffs' employment.

This action was brought pursuant to the provisions of Title 42, United States Code, Sections 1983 and 1985, and under the authority of Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980). Plaintiffs alleged in their complaint two alternative theories of liability: (1) that all Defendants participated directly in a conspiracy to deprive them of their civil rights; and/or (2) that the Defendants Gilbertson, Miller and Rockefeller

indirectly violated their rights by failing to act when they "knew or should have known" of the alleged unconstitutional conduct.

Defendants answered the complaint, denying unlawful conduct and affirmatively asserting both their official immunity and their good faith in acting as officers of the state.[3] The immunity defense, although not raised by motion prior to the scheduled prehearing conference, was nevertheless considered by this Court in anticipation of the March 7 injunction hearing. The Court determined, and so informed the parties on March 2, 1983, that under the Eleventh Amendment to the United States Constitution and under Edelman v. Jordan, 415 U.S. 651 (1974), Alabama v. Pugh, 438

---

[3] Wilton Williams, however, was not a state employee and thus could assert no immunity or good faith defenses.

U.S. 781 (1978), and Quern v. Jordan, 440 U.S. 332 (1979), Plaintiffs were precluded from obtaining injunctive relief in the form of back pay from the state officials in their official capacities.[4] Plaintiffs were then given the option of (a) proceeding against Defendants on March 7 solely to determine their entitlement to prospective injunctive relief, i.e., reinstatement, or (b) of amending their complaint to replace their back pay request with a prayer for money damages in that amount from Defendants as individuals.[5]

---

[4] This decision was made prior to the issuance of the West Virginia Supreme Court of Appeals' decision in Martin v. West Virginia Board of Regents, No. 15438 (June 30, 1983).

[5] The complaint as originally filed sought only injunctive relief: That is, retrospective relief in the form of back pay; and prospective relief in the form of reinstatement to their previously held positions.

Plaintiffs chose to amend their complaint.

The motions of Defendants Gum, Gilbertson, Miller and Rockefeller in their individual capacities for judgment on the pleadings are based upon the character of the relief requested in Plaintiffs' original complaint. While Defendants as individuals may have been entitled to partial judgment on the pleadings had the complaint not been amended, since the injunctive relief sought was recoverable merely from Defendants as State officials, because the Plaintiffs' claim now seeks money damages from Defendants, Defendants' motions are moot and, therefore, must be denied. See Burt v. Board of Trustees, 521 F. 2d 1201 (4th Cir. 1975); Miller v. Board of Education of Cty. of Lincoln, 450 F. Supp. 106 (S.D. W.Va. 1978).

Those issues revolving around

Plaintiffs' original prayer for relief were, as noted, heard by the Court at a prehearing conference conducted on March 2, 1983. Because Plaintiffs opted at that time to amend the complaint, this Court ordered the March 7, 1983, hearing continued and consolidated with the August 22, 1983, trial on the merits. By doing so, the Court thus rendered moot Defendants' motions for continuance and consolidation.

One other motion pre-dates Plaintiffs' amended complaint, that is, the motion of Defendant Rockefeller for judgment on the pleadings and for summary judgment. The bases for that motion are trifold: First, that the complaint fails to set forth Plaintiffs' allegations with the requisite particularity; second, that the record does not support the charges; and third, that Defendants are entitled to judgment because of their official

qualified immunity. The Court is of the opinion to deny this motion, primarily because the pleading and immunity issues and the discussion of the merits are addressed in subsequent motions post-dating the amended complaint.[6]

Remaining for decision, then, are six dispositive motions which post-date the amended complaint. Two motions filed on behalf of Defendants Gilbertson and Gum parallel two filed by Defendant Rockefeller; each have moved (1) for dismissal of Plaintiff, Drexelene

---

[6] The pleading issue is raised in Defendant Rockefeller's motion to dismiss the amended complaint and the motion of Defendants Gilbertson and Gum for judgment on the pleadings and for summary judgment; the immunity issue is addressed in the subsequent motions by Defendants Gilbertson, Miller and Rockefeller for summary judgment based upon official immunity. That portion of Defendant Rockefeller's motion which is concerned with the merits is considered infra together with Defendants Gilbertson and Miller's motion for judgment on the pleadings and for summary judgment.

Perrine, and (2) for summary judgment based upon official immunity. In addition, Defendant Rockefeller has, as noted, moved for dismissal of the amended complaint, a motion which presents essentially the same allegations as Defendants Gilbertson and Miller's motion for judgment on the pleadings and for summary judgment. The motion for dismissal of Plaintiff Perrine is unopposed by Plaintiffs, and, therefore, may be granted without further discussion. The balance of the dispositive motions, are, however, opposed by Plaintiffs and memoranda in response thereto, supplemented by Plaintiffs' counsel's affidavit[7] have been submitted.

---

[7] This affidavit is the subject of a motion to strike by Defendant Rockefeller. That motion will be addressed below.

I. Defendant Rockefeller's Motion to Dismiss the Amended Complaint and Defendants Gilbertson and Miller's Motion for Judgment on the Pleadings and for Summary Judgment

These dispositive motions, although variously styled, present essentially the same arguments, that is, insufficiency of the pleadings, and failure to state a claim. In addition, Defendant Rockefeller asserts that injunctive relief is inappropriate in this case and that, in any event, injunctive relief against him as Governor of West Virginia, is precluded both on the grounds of immunity and because he is not a proper party to afford Plaintiffs such relief.

Defendants' argument relating to insufficiency of the pleading is based primarily upon the degree of particularity with which Plaintiffs have supported their claims through factual allegations in the complaint. In support

of this argument, Defendants point to two specific defects: First, that the conspiracy claim failed to allege with particularity any "overt act" which would indicate Defendants actually participated in a conspiracy; and second, that Plaintiffs' "knew or should have known" claim is supported only by conclusory allegations, which indicate that Plaintiffs rely solely upon the doctrine of respondeat superior for their recovery.

In the Court's opinion, Plaintiffs support both their theories of liability, i.e., the conspiracy claim under 42 U.S.C. § 1985 (3) and the "knew or should have known claim" under Section 1983, by detailed allegations.[8] The complaint describes the political history of the

---

[8] Four pages of the complaint are devoted to the explication of facts relied upon for relief by Plaintiffs.

DOH, the chronology and character of the Defendants' service with State government, the relationships of the Defendants with each other and with the Plaintiffs, the opposing party ideologies of Plaintiffs and Defendants, the details of Plaintiffs' employment history and their terminations, a statistical survey of employment practices of the Defendants with the DOH relative to the hiring of Democrats and Republicans, the alleged power of Defendants Gilbertson, Miller and Rockefeller to control discriminatory practices, their alledged knowledge of such practices, and their alleged intent to continue, and/or failure to prevent such practices. (Complaint, Paragraphs 3-18).

Defendants correctly argue that civil rights pleadings must set forth with particularity those facts upon which the pleader relies for relief. United

Black Firefighters of Norfolk v. Hirst, 604 F. 2d 884 (4th Cir. 1979); Picking v. State Finance Corporation, 332 F. 2d 1399 (D. Md. 1971) affirmed 450 F. 2d 881 (4th Cir. 1971) cert. denied 405 U.S. 1048; 2A Moore's Federal Practice, §8.17(5) at 8-182 (1979). The purpose of such a requirement, however, is not to require Plaintiffs to plead all of their evidence but merely to provide the Defendants with facts sufficient to apprise them of the nature of the charges in order that they may adequately plead and defend the cause. Picking v. State Finance Corporation, supra; Vasquez v. Ferre, 404 F. Supp. 815 (D. N.J. 1975); Jordan v. Wolke, 460 F. Supp. 1080 (E. D. Wis. 1978). Plaintiffs need not plead evidentiary facts in the complaint. E.g. School District of Kansas City, Missouri v. State of Missouri, 460 F. Supp. 421 (W.D. Mo. 1978); Yates v. Mahogony

Ass'n., 129 F. 2d 227 (3d Cir. 1941).

Pleadings are to be judged by substance, rather than by form, to facilitate the fair and just resolution of controversies between litigants; they should not be construed to raise barriers which prevent the achievement of that end. Matz v. Grasselli Chemical Co., 303 U.S. 197 (1938); Conley v. Gibson, 355 U.S. 41 (1957). In Ratcliffe v. Insurance Company of N. America, 482 F. Supp. 759 (E. D. Pa. 1980) the court was presented with the precise argument being made by Defendants here, i.e., that because civil rights cases require pleadings be made with factual specificity, Plaintiffs' claim should be dismissed. The court stated there that even though certain portions of the complaint were cast in conclusory language, where other sections alleged discriminatory acts with sufficient

specificity to meet the requirements of Rule 8, Federal Rules of Civil Procedure, and to give adequate notice of the charge to be defended, Defendants' motion to dismiss the complaint would be denied.

Similarly, in School District of Kansas City, Missouri v. State of Missouri, supra, the complaint was held reviewable under the provisions of Rule 8(a) requirements, not against some stricter standard.[9] The Court held there that the complaint was sufficient when it

---

[9] This Court is of the opinion that those cases holding that greater specificity is required in civil rights complaints than in other types of complaints are not altering the basic rationale behind Rule 8, but are merely acknowledging the necessity for protection of Defendants' right to be adequately advised of the charges against him in an area of law wherein conclusory allegations provide the potential for abuse of the judicial process. The requirements of Rule 8(a) incorporate the rules of notice pleading, and are accorded a liberal construction. Conley v. Gibson, supra.

alleged that defendants transferred students for purposes of segregation, discriminated in employment, prevented changed in district boundaries which would have reduced segregation, and failed to correct the effects of pre-1954 segregation. The allegations set forth in Plaintiffs' complaint here are no less specific than those found sufficient in School District, and the Court would find, therefore, that the complaint was pleaded with sufficient particularity.

The Court's ruling just stated applies to both the "knew or should have known" claim and the conspiracy claim. Defendants argue that the conspiracy claim is defective as failing to allege an "overt act"; however, the Court deems that allegation in which Plaintiffs state they were terminated by reason of their political affiliation to meet that

requirement specifically.[10/] In reviewing the sufficiency of a complaint alleging conspiracy, the Court must take cognizance of the fact that Plaintiffs' access to specific facts surrounding a civil rights conspiracy is often limited; therefore, a certain degree of liberality in construction is warranted, particularly with regard to those allegations concerning combination of the conspirators. Vasquez v. Ferre, supra.

---

[10] DeVitt and Blackmar defines an "overt act" as:

"Any act knowingly committed by one of the conspirators, in an effort to effect or accomplish some object or purpose of the conspiracy. . . . It may be as innocent as the act of a man walking across the street, or driving an automobile, or using a telephone. It must, however, be an act which follows or tends toward accomplishment of the plan or scheme, and must be knowingly done in furtherance of some object or purpose of the conspiracy. . . ."

2 DeVitt and Blackmar, Federal Jury Practice and Instructions, § 27.07 at 22 (1977).

The complaint is sufficient when it otherwise states a claim upon which relief can be granted.

Having found the complaint filed herein to be sufficiently specific to inform the Defendants of the charges which they are to defend, the Court now proceeds to determine the issue of whether a claim has been stated. Defendants do not seriously contend that political discrimination provided no basis for a cause of action in this Court; they could hardly do so in light of Elrod v. Burns, supra, and Branti v. Finkel, supra. Their argument, instead pivots around two supplemental contentions: (1) That because the pleadings are nonspecific as to particular actions taken by each Defendant, the Court can only conclude that Plaintiffs' theory of liability rests upon the doctrine of respondeat

superior;[11] and (2) That, in the absence of such specific allegations, Defendants' averments of good faith should permit the Court to award Defendants judgment on the merits. The Court is not persuaded that Plaintiffs' complaint is deficient for either reason.

With regard to those contentions addressed to the merits, the Court would note that the parties have engaged in extensive discovery during the pendency of this action. In their second argument, Defendants have not made reference to the record in any comprehensive fashion to support their position that summary judgment on the merits is appropriate. Had they done so, the Court believes that material issues

---

[11] Plaintiffs cannot base a civil rights claim upon the theory of respondeat superior. Vinnedge v. Gibbs, 550 F. 2d 926 (4th Cir. 1977).

of fact would be shown in dispute. The complaint is not deficient for failing to overcome Defendants' allegations of good faith. Indeed, the United States Supreme Court held recently in Gomez v. Toledo, 446 U.S. 635 (1980) that plaintiff need not even allege bad faith in his complaint, that good faith is merely a matter of defense to be proved or disproved at trial. Clearly, then, Defendants' second argument must fail as a basis for dismissal of this action.

Defendants' first argument premises upon a finding by this Court of insufficient particularity in the pleading. Since the Court has determined otherwise, the sole question remaining is whether proper theories of liability have been asserted. To establish a conspiracy claim under Section 1985(3), Plaintiffs must allege four elements, that is:

1. That Defendants did conspire;

2. For the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection laws, or of equal privileges and immunities under the laws;

3. That one or more of the conspirators did, or caused to be done, any act in furtherance of the object of the conspiracy, whereby another was

4(a). Injured in his person or property, or

4(b). Deprived of having and exercising any right or privilege of a citizen of the United States. Griffin v. Breckenridge, 403 U.S. 88 (1971). Brekenridge involved an alleged deprivation of the black plaintiffs' right to free speech, assembly and association; the United States Supreme Court held these allegations supported the requisite animus to deprive plaintiffs of equal enjoyment of a legal right so as to state a claim under

Section 1985(3). Although Breckenridge involved allegations of invidious racial discrimination, a Section 1985 action may properly be based upon political class-based animus, as indeed, plaintiff did in Elrod. See also, Kimble v. D. J. McDuffy, Inc., 648 F. 2d 340 (5th Cir. 1981); Hampton v. Hanrahan, 600 F. 2d 600 (7th Cir. 1979) reversed in part on other grounds 446 U.S. 754, rehearing denied 448 U.S. 913; Gibbins v. Bond, 623 F. Supp. 845 (W.D. Mo. 1981) affirmed 668 F. 2d 967 (8th Cir. 1981). Cf., Marino v. Bowers, 657 F. 2d 1363 (3d Cir. 1981). Since Plaintiffs have alleged facts which, if assumed to be true, allege each element of a cause of action under Section 1985(3),[12] it is clear that a

---

[12] Plaintiffs have alleged (1) a conspiracy; (2) their membership in a class of persons deprived of equal protection of the laws; (3) an overt act; and (4) injury to their property interest in employment.

claim upon which relief can be granted has been stated in Plaintiffs' complaint.[13]

The cause of action previously styled a "knew or should have known" claim falls under the provisions of 42 U.S.C. § 1983. As Plaintiffs correctly argue, only two allegations are necessary to state a claim under that section: (1) That some person deprived Plaintiffs of a federal right; and (2) That such person acted under color of state or territorial law. Gomez v. Toledo, supra. Elrod V. Burns makes clear that the acts complained of by Plaintiffs here implicate both First and Fourteenth Amendment rights. Defendants, with the exception of Defendant Wilton Williams, admit they were acting under color of

---

[13] Plaintiffs might also establish their conspiracy claim pursuant to the provisions of Section 1983, under the following analysis.

State law when the alleged terminations occurred. These facts are sufficient without questions to state a claim against Defendant Gum. However, Defendants Gilbertson, Miller and Rockefeller challenge the complaint as insufficient based on Plaintiffs' alleged failure to aver an "affirmative link" indicating some personal involvement of these Defendants in the acts complained of. See Rizzo v. Goods, 423 U.S. 362 (1976). In the Fourth Circuit, such an affirmative link may be demonstrated through proof that a defendant "knew or should have known" of the challenged practice, but evidenced deliberate indifference to Plaintiffs' constitutional rights. Orpiano v. Johnson, 632 F. 2d 1096 cert. denied 450 U.S. 929. Since, in an action under the authority of Elrod and Branti, Plaintiffs' prima facie case does not

include dis-proof of an independent reason for the discharges, Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1976), Miller v. Board of Education of County of Lincoln, supra, the complaint herein, again assuming the truth of the facts alleged for the purposes of this motion, states a claim upon which relief can be granted under Section 1983. See also Brule v. Southworth, 611 F. 2d 406 (1st Cir. 1979); Tanner v. McCall, 625 F. 2d 1183 (5th Cir. 1980) cert. denied 451 U.S. 907 (1981). In summary, both of the theories of liability relied upon by Plaintiffs properly assert the stated causes of action.

One additional ground for dismissal was raised by Defendant Rockefeller in his motion, although not briefed by his memorandum: That the injunctive relief sought by Plaintiffs was not properly

directed toward him as Governor. The Court is of the opinion that this argument lacks merit, in view of the nature of the injunctive relief sought, i.e., a permanent injunction against all Defendants restraining them "from further violating the rights and immunities granted to Plaintiffs under the Constitution of the United States of America." (Complaint, p. 9 Paragraph a). Such an injunction, if issued, would appropriately be directed toward all Defendants, including Defendant Rockefeller. Neither is reinstatement an inappropriate remedy. McMullan v. Thornburgh, 508 F. Supp. 1044 (E. D. Pa. 1981) construing Johnson v. Bergland, 586 F. 2d 993, 995 (4th Cir. 1978). See also Burns v. Elrod, 509 F. 2d 1133, 1135 (7th Cir. 1975). Therefore, this remaining ground for dismissal must also be denied.

II. Defendants' Motion for Summary Judgment Based on Official Immunity

Defendants Rockefeller, Gilbertson and Miller urge the Court in this motion to award them summary judgment based upon the qualified immunity each possesses as State officials. See Scheuer v. Rhodes, 416 U.S. 232 (1974). The basis for their argument rests upon the United States Supreme Court's recent holding in Harlow v. Fitzgerald, ___ U.S. ___, 102 S. Ct. 2727 (1982), wherein the Court held that "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id.

at 2738.[14/] In their motion, Defendants argue that the law governing "patronage termination" is not clearly established, and that, therefore, summary judgment is appropriate. Specifically, Defendants claim that Elrod and Branti preclude relief unless political affiliation can be shown the "sole cause" of Plaintiffs' terminations, and that "sole cause" has been accorded such varying interpretations in subsequent decisions that this Court must determine the constitutional rights at issue not "clearly established" for the purposes of evaluating the propriety of summary judgment under Harlow. Under this theory, Defendants argue that, given the necessity for a reduction in force which

---

[14] The Harlow Court expressed no view upon the effect of a defendant's immunity defense in an action for injunctive or declaratory relief. Id at 2739, n. 34.

existed in fiscal year 1981, even if Defendants terminated Plaintiffs because of their affiliation with the democratic party, the law which purports to preclude this action was not so "clearly established" as to warrant continuation of this action againt them. Thus Defendants content they could not have been expected to realize that, even if an independent reason for terminating some person existed, they would not be free to select exclusively Democrats for that purpose, since those firings could not have resulted "solely" from political considerations. The Court cannot agree with this analysis.

Plaintiffs' constitutional right to freedom from termination based upon political affiliation or association has been "clearly established" since the Supreme Court's decision in Elrod. The same constitutional principle was

subsequently reaffirmed in Branti, prior to Plaintiffs' terminations.[15/] This case does not present the type of situation involved in Procunier v. Navarette, 434 U.S. 555 (1978) where defendants were held not liable for failure to foresee the establishment of a constitutional right prior to its enunciation.

Here, Defendants admit to actual knowledge of the ban on politically motivated terminations established in Elrod.

The test which governs the determination of whether a plaintiff's

---

[15] The Supreme Court's subsequent decision in Branti did revise the standard for determining which public employees were protected under Elrod; however, that revision concerned whether a plaintiff need establish his status as a "non-policy making, non-confidential" public employee. Defendants' argument is not directed toward this issue, but rather toward the role which political considerations may properly play in the decision to terminate an employee.

First and Fourteenth Amendment rights have been infringed by reason of a "political firing" is as clearly established as the right. This Court's decision in Miller v. Board of Education of County of Lincoln, supra, decided in 1978, applied the standard set forth in Mt. Healthy City Board of Education v. Doyle, supra, a test which has uniformly applied to patronage dismissal actions since that time. Tanner v. McCall, 625 F. 2d 1183 (5th Cir. 1980) cert. denied 451 U.S. 907 (1981); Wren v. Jones, 635 F. 2d 1277 (7th Cir. 1981) cert. denied 454 U.S. 832 (1981); Nekolny v. Painter, 653 F. 2d 1164 (7th Cir. 1981) cert. denied 102 S. Ct. 1719 (1982); Barrett v. Thomas, 649 F. 2d 1193 (5th Cir. 1981) cert. denied 102 S. Ct. 1769)1982); McMullan v. Thornburgh, supra, Farkas v. Thornburgh, 493 F. Supp. 1168 (E.D. Pa. 1980) affirmed mem. 633 F. 2d 209 (3d

Cir. 1980) affirmed mem. sub nom appeal of Farkas 642 F. 2d 441 (3d Cir. 1981); Visser v. Magnarelli, 530 F. Supp. 1165 (N.D. N.Y. 1982); Abraham v. Pekarski, 537 F. Supp. 859 (E.D. Pa. 1982).[16] The Mt. Healthy test, reaffirmed in Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979), provides that, once plaintiff has satisfied his prima facie burden of demonstrating (1) that his conduct was constitutionally protected; and (2) that his conduct was a "substantial" or "motivating" factor in the decision to terminate him, then defendant must prove by a preponderance of the evidence that the same employment decision would have been reached as to plaintiff even in the absence of the

---

[16] Although Sands v. Starke County Board of Commissioners, 530 F. Supp. 712 (N.D. Ind. 1982) did not cite the Mt. Healthy test in its decision, it did rely upon the opinion in Wren v. Jones, supra, which did apply Mt. Healthy.

protected conduct, i.e., that plaintiffs' political affiliation was not the "sole cause" of his termination. There is no inconsistency between "sole cause" and the Mt. Healthy/Givhan standard which might reasonably be viewed as the basis for misconception of the scope of Elrod and the public employees' first amendment rights. If the sole cause of Plaintiffs' terminations was a reason other than political affiliation, Defendants shoulder the burden of proof of that reason once Plaintiffs have established a prima facie case. The Court holds that Plaintiffs' constitutional rights were "clearly established" at the time of their terminations,[17] and thus that Defendants are not entitled to summary

---

[17] The Court is further of the opinion that, in view of the expansive holdings in Elrod and Branti, Defendants reasonably could not have permitted political considerations to play a part

Defendants are not entitled to summary judgment on that ground.

Under Harlow, the ruling just stated completes this Court's analysis of Defendants' immunity defense for purposes of the instant motion. "On summary judgment, the judge appropriately (must) determine. . . whether the law was clearly established at the time an action occurred. . . . If the law was clearly

---

(footnote 17, continued)

in the decision to terminate Plaintiffs even if the meaning of "sole cause" was not clearly established. Those decisions plainly prohibit conditioning public employment upon political affiliation. If in fact Defendants chose to interpret those decisions as permitting them to select for discharge only those of the opposing political party where a legitimate basis for discharging someone existed, they did so at their own risk. The Court cannot hold that a reasonable government official would have made such a determination in light of Elrod and Branti. For this Court to award Defendants summary judgment on the proffered basis would strip public employees of the protection afforded by the Elrod and Branti holdings.

established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." 102 S. Ct. at 2739.

The sole remaining ground relied upon by Defendants addresses itself to the merits of the case. Defendants argue, relying upon voluminous affidavits and exhibits, that their good faith has been conclusively established, and that the Court may find as a matter of law that they are, therefore, entitled to judgment. Plaintiffs' response, however, sets forth allegations which, if assumed to be true for the purposes of this motion, create genuine issues of material fact precluding summary judgment.[18] See

---

[18] Defendants have challenged Plaintiffs' response by moving to strike the supporting affidavit of Plaintiffs' counsel submitted therewith. However, since this Court found it unnecessary to base its ruling upon the affidavit, the motion will be denied.

Scheuer v. Rhodes, supra, at 249-250.

Accordingly, in view of the foregoing, the Court hereby ORDERS:

1. The motion of Defendants Gum, Gilbertson and Miller for judgment on the pleadings is denied as moot;

2. The motion of Defendant Rockefeller for judgment on the pleadings is denied as moot;

3. The motion of Defendants Gum, Gilbertson and Miller for continuance and consolidation with trial on the merits is denied as moot;

4. The motion of Defendant Rockefeller for continuance and for consolidation with trial on the merits is denied as moot;

5. The motion of Defendant Rockefeller for judgment on the pleadings and for summary judgment is denied as moot;

6. The motion of Defendants Gum,

Gilbertson and Miller to dismiss Plaintiff Drexelene Perrine is granted;

7. The motion of Defendant Rockefeller to dismiss Plaintiff Drexelene Perrine is granted;

8. The motion of Defendants Gilbertson and Miller for judgment on the pleadings and for summary judgment is denied;

9. The motion of Defendant Rockefeller to dismiss the amended complaint is denied;

10. The motion of Defendants Gilbertson and Miller for summary judgment based on official immunity is denied;

11. The motion of Defendant Rockefeller for summary judgment based on official immunity is denied; and

12. The motion of Defendant Rockefeller to strike the affidavit of Plaintiffs' counsel is denied.

The Clerk is directed to send a certified copy of this Memorandum Opinion and Order to counsel of record.

ENTER: 7/21/83

/s/ Charles H. Haden, II
Charles H. Haden II,
Chief Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-1790

John M. Bever, et al, Appellees,

versus

Walter Gilbertson and
Charles L. Miller, Appellants,

and John Gum, et al Defendants.

No. 83-1791

John M. Bever, et al, Appellees,

versus

John D. Rockefeller, IV, Appellant,

and

John Gum, et al, Defendants.

O R D E R

The appellants' petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A

poll of the court was requested, and in the poll there was an equal division of the participating judges in regular active service. Judges Russell, Widener, Hall and Chapman voted in favor of en banc rehearing while Judges Winter, Phillips, Murnaghan and Ervin voted against it. Judge Sprouse disqualified himself.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Haynsworth for a panel consisting of Judge Winter, Judge Hall, and Judge Haynsworth.

For the Court,

/s/ William K. Slate, II
CLERK

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 83-1791

John M. Bever, Clearyl Davis, John E. Ellifritt, Cecil Fling, Drexelene Perrine, Francis D. Radcliff, Robert W. Robinson, Michael Shepherd, Larry Williams, Larry W. Griffin, Appellees,

v.

John D. Rockefeller, IV, Appellant,

and

John Gum, Walter Gilbertson, Wilton Williams, Charles L. Miller, individually and as Commissioner of the West Virginia Department of Highways, Defendants.

Appeal from the United States District Court for the _____ District of South Caroline.

This cause came to be heard on the record from the United States District Court for the _____ District

of South Carolina.

On consideration whereof, it is now here ordered and adjudged by this Court that a certificate of probable cause to appeal is denied, and the appeal is hereby, dismissed.

/s/ William K. Slate, II
CLERK

APPENDIX E

AMENDMENTS TO THE CONSTITUTION[9]

(Amendment I)

(Freedom of Religion, of Speech, and of the Press)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(Amendment IX)

(Reservation of Rights of the People)

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

(Amendment XIV)

Section 1.

(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virginia Island, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655 § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

Ch. 21 CIVIL RIGHTS 42 § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

§ 17-2A-4. Selection, organization, classification, etc., of personnel; business manager and chief engineer assistants; employees' bonds.

The commissioner shall be in charge of and responsible for the selection, employment and effective organization of all commission personnel for the entire state road and highway program. He may establish such divisions, sections and other functional and organizational units within the commission as may be necessary and practical in the full and effective discharge of the duties and responsibilities of his office. Except as otherwise provided by law, all commission personnel shall be classified pursuant to the job classification system and shall be paid pursuant to the salary scale established by the commissioner.

The commissioner shall select and employ a business manager assistant and one or more chief engineer assistants who shall be registered professional engineers, and shall establish such other offices, activities, divisions, sections and organizational units as may be necessary and practical. The business manager assistant shall be in charge of and responsible for matters of finance and such other functions as may be assigned to him from time to time by the commissioner. The chief engineer assistant or, if the commissioner has selected and employed more than one chief engineer assistant, the chief engineer assistants shall be in charge of and

responsible for planning, equipment, materials, construction, maintenance, and such other functions as may be designated by the commissioner as well as such other functions as may from time to time be assigned to such chief engineer assistant or assistants by the commissioner.

The commissioner shall require every employee who collects fees or handles funds or who has custody or control of equipment or supplies belonging to the State to give bond, with such sureties and in such penal sums as may be approved by the commissioner, for the faithful discharge of each such employee's duties and his accounting for all such fees, funds, equipment and supplies coming into his hands or under his custody or control. All such bonds, when approved by the commissioner, shall be filed in the office of the secretary of state. Premiums on all such bonds shall be paid from commission funds. (1957, c. 143; 1973, c. 116.)

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

JOHN M. BEVER, et al.,

Plaintiffs,

v. CIVIL ACTION NO. 82-2506

JOHN GUM, et al.,

Defendants.

AFFIDAVIT OF GOVERNOR ROCKEFELLER

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, To-Wit:

JOHN D. ROCKEFELLER IV, being first duly sworn, deposes and says as follows:

1. He is Governor of the State of West Virginia and one of the defendants in this case. He was first elected Governor in the general election of November, 1976, was inaugurated January 17, 1977, and was elected to a second term in the general election of November, 1980.

2. As Governor, he does not normally participate or attempt to participate in the employment decisions of individual state agencies, including the Department of Highways, for the reason that such decisions are considered to be within the jurisdiction and authority of the respective heads of the State agencies. The Governor's only involvement in such employment decisions is in terms of setting the tone and policy of his administration with regard to employment practices, as reflected by the following acts:

a. During the Governor's first term in office and in fact beginning early in 1977, the Governor's staff, at his direction, instructed executive department heads concerning the Supreme Court decision of Elrod v. Burns and the constitutional

prohibition against depriving public employees in non-policymaking positions of their jobs on the basis of political affiliation; and

b. In November of 1978, the Governor promulgated Executive Order No. 16-78, which, among other things, instructed all executive agencies that the policy of the State of West Virginia was and is opposed to discrimination in employment on the basis of race, color, sex, national origin, handicap, age, religion or political affiliation. A copy of this Executive order is attached hereto and made a part hereof as "Exhibit A."

3. The Governor does not know the plaintiffs in this case, had no personal involvement in the decision to terminate these plaintiffs from employment with the Department of Highways, has no knowledge that any of these plaintiffs were in fact terminated from such employment on the basis of their political affiliations or beliefs, and has no knowledge concerning their terminations other than as acquired in connection with this litigation and as set forth in this Affidavit.

4. The Governor did not participate in and has no knowledge concerning any unlawful conspiracy, scheme or plan to deprive these plaintiffs of their employment with the Department of Highways or to deprive any person of his or her employment with the Department of Highways based on political affiliation.

5. In January 1980, the Governor, in performing his constitutional mandate

to provide revenue estimates with respect to budget proposals made to the Legislature for fiscal year 1981 (July 1, 1980 through June 30, 1981), estimated that State Road Fund revenues from taxes and fees (Gasoline, Motor Vehicle and Privilege Taxes and Fees) for fiscal year 1981 would be in the sum of $228.5 million. These estimates were made by the Governor and submitted to the Legislature on the basis of information provided him by the Commissioner of Finance and Administration. However, due to a worsening economy, actual revenues received by the Road Fund in fiscal year 1981 from these taxes and fees totaled only $191.6 million, a shortfall of $36.9 million.

6. The Governor is advised and believes that these plaintiff's positions with the Department of Highways were eliminated in the first half of 1981 as

part of a substantial reduction in the workforce of the Department of Highways. This reduction in the Department of Highways workforce was a consequence of a series of events and circumstances and of decisions relating thereto which were made by Commissioner Charles L. Miller in consultation with the Governor and his staff. This decision-making process is described as follows:

a. In late 1980 and early 1981, the Governor and his staff were advised by Commissioner Miller of severe fiscal and budgetary constraints in the Department of Highways. These budgetary constraints resulted from a combination of causes, including (1) the aforesaid failure of Road Fund revenues to meet estimates, (2)

reductions in highway funds available from the federal government, and (3) insufficient legislative appropriations to the Department of Highways;

b. Various alternative procedures for coping with these problems, including reductions in the number of Department of Highways personnel, were proposed, considered and evaluated by the Department of Highways and the Governor's office. These alternatives, including the need for and timing of reductions in Department of Highways personnel, were documented by Commissioner Miller in a series of memoranda to the Governor and his staff,

which are attached hereto and made a part hereof as follows:

(1) "Exhibit B-1": Memorandum of November 17, 1980 - Commissioner Miller to Governor Rockefeller;

(2) "Exhibit B-2": Memorandum of November 19, 1980 - Commissioner Miller to Governor Rockefeller;

(3) "Exhibit B-3": Memorandum of December 18, 1980 - Commissioner Miller to Governor Rockefeller;

(4) "Exhibit B-4": Memorandum of January 7, 1981 - Commissioner Miller to Governor Rockefeller;

(5) "Exhibit B-5": Memorandum of January 14, 1981 - Commissioner Miller to Governor Rockefeller;

(6) "Exhibit B-6": Memorandum of January 15, 1981 - Commissioner Miller

to Governor Rockefeller;

(7) "Exhibit B-7": Memorandum of March 16, 1981 - Commissioner Miller to Executive Assistant Nick Lazaris;

(8) "Exhibit B-8": Memorandum of March 18, 1981 - Commissioner Miller to Mr. Lazaris;

(9) "Exhibit B-9": Memorandum of May 26, 1981 - Commissioner Miller to Mr. Lazaris;

(10) "Exhibit B-10": Memorandum of June 9, 1981 - Commissioner Miller to Governor Rockefeller; and

c. Based on information available to him in late 1980 and early 1981 concerning the fiscal constraints confronting the Department of Highways, the supplemental appropriations

provided by the Legislature to the Department of Highways for fiscal year 1981, and the appropriations provided to the Department of Highways by the Legislature for fiscal year 1982 (July 1, 1981 through June 30, 1982), the Governor believed and believes, given the available financial resources, that reductions in Department of Highways personnel were necessary and essential to the fulfillment of his statutory and constitutional obligations as Governor to maintain the fiscal integrity of the State, and to the continuation of a viable road maintenance and construction program in the State of West Virginia.

7. At no time in connection with the decision to reduce the Department of Highways workforce in 1981 did the Governor consider, suggest, authorize, or otherwise intend that such reduction be accomplished because of or based on the political affiliation or beliefs of any Department of Highways employee.

8. At no time in connection with the implementation of the reduction of the Department of Highways workforce in 1981 did the Governor authorize or appoint Wilton Williams or any Democratic party official to act as his agent in connection with any decision to terminate the plaintiffs in this case.

9. At no time during the period in which these reductions in the Department of Highways workforce were implemented in 1981 was the Governor advised of or did he have knowledge of any effort or attempt to implement such reduction in

the Department of Highways workforce through a pattern or practice of political discrimination.

10. All actions taken by the undersigned as Governor and by the Governor's office with respect to these 1981 layoffs were taken in good faith, were based solely upon fiscal and budgetary constraints impacting upon West Virginia and the Department of Highways, and were wholly unrelated to political considerations.

And further affiant saith not.

/s/ John D. Rockefeller IV
JOHN D. ROCKEFELLER IV

Taken, sworn and subscribed before me this 20th day of May, 1983.

My commission expires Feb. 1, 1989.

/s/ SANDRA W. LOPINSKY
NOTARY PUBLIC

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

At Charleston

JOHN BEVER, et al.,

Plaintiffs,

v. CIVIL ACTION NO. 82-2506
(Chief Judge Haden)

JOHN GUM, et al.,

Defendants.

AFFIDAVIT OF CHARLES L. MILLER

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, To-Wit:

Charles L. Miller, being first duly sworn, deposes and says as follows:

1. Commissioner Miller is Commissioner of Highways of the State of West Virginia, having been appointed to that position in September of 1977 by Governor Rockefeller. He has served continuously as Commissioner of Highways since that time.

2. Prior to being appointed

Commissioner, Commissioner Miller was Chief Engineer of Operations for the Department. Commissioner Miller has been employed in the Department of Highways in various capacities since 1954, and was District Engineer of District Two from 1974 to 1977. He received a B.S. degree in Civil Engineering from West Virginia University in 1961.

3. Throughout his employment with the Department of Highways, he has engaged in no political activity other than voting.

4. The West Virginia Department of Highways is a statewide agency organized into fifty-five county units and six district units in the field throughout the State, as well as approximately twenty divisions and other top level managerial and engineering offices in the central headquarters in Charleston.

5. During 1979, the Department had

in excess of 7900 employees assigned to these various units. This level of employment has been steadily reduced since that time, both by attrition and by layoff, to approximately 5813 employees at the end of fiscal year 1981, to 5476 employees at the end of fiscal year 1982, and to 5274 employees at present. This represents a total reduction in the work force of the Department of Highways of over 2600 employees since 1979.

6. In late 1980, severe fiscal and budgetary constraints were imposed upon the Department of Highways resulting from a combination of occurrences, including (a) the failure of Road Fund revenues to meet estimates, (b) reductions in highway funds available from the federal government, and (c) insufficient legislative appropriations to the Department.

7. In early 1981, because of these

serious fiscal and budgetary constraints, cost reduction measures in the form of personnel cutbacks were effected in the Department of Highways in a series of three layoffs. In these layoffs a total of approximately 1531 employee positions were eliminated. These layoffs occurred as follows:

a. Approximately 185 employees on February 6, 1981;

b. Approximately 496 employees on February 27, 1981; and

c. Approximately 850 employees on June 30, 1981.

In addition to these layoffs, a total of 142 CETA positions were eliminated on April 1 and July 28, 1981.

8. In January 1980, the Governor, in his revenue estimates for fiscal year 1981, estimated that the State Road Fund would generate revenues in fiscal year 1981 in the sum of $228.5 million.

However, actual revenues received failed to comport with these estimates, with Road Fund receipts for fiscal year 1981 being in the sum of approximately $191.6 million, $36.9 million less than the estimate made eighteen months earlier.

9. The reasons for the cost reduction step in the form of the February 6, 1981 layoff were outlined by Commissioner Miller in a memorandum of December 18, 1980 entitled "Cost Reduction Proposal: Contract Administration Programs" directed to Governor Rockefeller. A copy of this Memorandum is attached hereto and made a part hereof as "Miller Affidavit Exhibit A."

10. In an attempt to alleviate the budgetary problems of the Department in late 1980 and early 1981 and to forestall the necessity of further reductions in personnel, relief was sought from the

Legislature in the form of a supplemental appropriation for fiscal year 1981. Although the Governor requested a supplemental appropriation in the sum of $31.5 million, the Legislature appropriated $26.5 million only. Confronted with the fact of this reduced supplemental appropriation and the necessity for further cost reductions, the second layoff of February 17, 1981 was effected.

11. The fiscal year 1982 budget request made by Governor Rockefeller included a transfer of $81.65 million to the Department of Highways from the General Revenue and Revenue Sharing Funds. However, legislative appropriations from the General Revenue and Revenue Sharing Funds to the Department for fiscal year 1982 totaled only $48.5 million. Because of the substantial reduction in the amount of

funds appropriated for transfer from General Revenue and Revenue Sharing Funds for fiscal year 1982, further cost reduction measures were required, including the layoff of additional personnel on June 30, 1981.

12. All actions taken by the undersigned as Commissioner with respect to these 1981 layoffs were taken in good faith, were based solely upon fiscal and budgetary constraints impacting upon West Virginia and the Department of Highways, and were wholly unrelated to political considerations.

13. At no time in connection with the decision to reduce the Department of Highway's work force in 1981 did Commissioner Miller consider, suggest, authorize or otherwise intend that such reduction be accomplished because of or based on the political affiliation or beliefs of any Department of Highways'

employee.

14. At no time in connection with the 1981 reduction in force of Department of Highways personnel was Commissioner Miller instructed or advised by Governor Rockefeller, any member of the Governor's staff, or any other person to effectuate such reduction based upon an employee's political affiliation or belief. In fact Commissioner Miller was instructed not to do so, and was specifically advised by persons on the Governor's staff about the case of Elrod v. Burns. Therafter, he properly adopted an affirmative action plan precisely in accordance with the State Affirmative Action officer's guidelines, arising out of Executive Order 16-78.

15. Commissioner Miller had no personal involvement whatsoever in the decision to terminate these specific plaintiffs, does not know these plaintiffs and has no knowledge

concerning the decisions to terminate these plaintiffs other than as acquired in connection with this litigation and as set forth in this Affidavit.

16. Commissioner Miller did not participate in and has no knowledge concerning any unlawful conspiracy, scheme or plan to deprive these plaintiffs of their employment with the Department of Highways or to deprive any person of his or her employment with the Department of Highways based on political affiliation.

And further affiant saith not.

/s/ Charles L. Miller
CHARLES L. MILLER

Taken, subscribed and sworn to before me this 13th day of June, 1983.

My commission expires September 22, 1991.

/s/ JANET L. RILEY
NOTARY PUBLIC

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

JOHN BEVER, et al.,

Plaintiffs,

v. CIVIL ACTION NO. 82-2506

JOHN GUM, et al.,

Defendants.

AFFIDAVIT OF WALTER GILBERTSON

STATE OF WEST VIRGINIA,

COUNTY OF HARRISON, to-wit:

Walter Gilbertson, being first duly sworn, deposes and says as follows:

1. He is District Engineer for District 4 of the West Virginia Department of Highways, having been appointed to that position November, 1977. He has served continuously since that time as District 4 Engineer, which district has as its headquarters at Clarksburg, West Virginia.

2. He has been employed since 1954 by the West Virginia Department of Highways in various capacities and is currently under the Civil Service System.

3. He has not been involved in any political activities since his employment with the West Virginia Department of Highways except for voting.

4. In 1981, there were a total of six (6) counties under the jurisdiction--Doddridge, Harrison, Marion, Monongalia, Preston and Taylor counties.

5. All actions taken by the affiant with respect to the 1981 layoffs were taken in good faith in accordance with the directives of Commissioner Charles Miller and applicable central office policies of the Department of Highways.

6. At no time did affiant consider, suggest, authorize or otherwise intend that the layoffs made in District 4,

including those required to be made in Doddridge County, be made on the basis, partially or wholly, of political affiliation of any employee of the Department.

7. At no time in connection with the 1981 reduction in force of the Department of Highways personnel was affiant instructed, advised or counseled by Commissioner Miller, Governor Rockefeller, or anyone else to effectuate the ordered layoffs based upon employees' political affiliations or beliefs.

8. Affiant had no personal involvement whatsoever in the decision to terminate these plaintiffs and has no knowledge concerning the decision to terminate these plaintiffs other than that acquired in connection with this litigation as set forth in this affidavit.

9. Affiant did not participate in

and has no knowledge concerning any unlawful conspiracy, scheme or plan to deprive these plaintiffs of their employment with the Department of Highways or to deprive any person of his or her employment.

And further affiant saith not.

/s/ Walter Gilbertson
WALTER GILBERTSON

Taken, subscribed and sworn to before me this 15th day of June, 1983.

/s/ Kathleen C. Berry
NOTARY PUBLIC

My commission expires July 21, 1985.

84-25

Office - Supreme Court, U S
FILED
OCT 4 1984
ALEXANDER L. STEVAS.
CLERK

No. 83-2139

In the

SUPREME COURT OF THE UNITED STATES

October Term 1983

JOHN D. ROCKEFELLER IV, individually and as Governor of West Virginia,

Petitioner,

v.

JOHN M. BEVER, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TIMOTHY N. BARBER
12 Capitol Street
Charleston, WV 25301
(304) 343-7676

Counsel for Respondents

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court's denial of petitioners' claim of qualified immunity, which can be resolved as a matter of law, is immediately appealable under the colateral order exception to 28 U.S.C. § 1291 enunciated in Cohen vs. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

2. Whether the approval of a reduction-in-force in state government for valid budgetary reasons contravenes any clearly established right of public employees under Elrod vs. Burns, 427 U.S. 347 (1976) and Branti vs. Finkel, 445 U.S. 507 (1980), not to be terminated solely on the basis of politics.*

---

*Pursuant to Rule 21.1(b) of the Rules of this Court, the following is a complete list of the parties in the underlying proceedings (identified as plaintiffs or defendants in the district

court, and as appellants or appellees in the court of appeals):

Plaintiffs/appellees . . .John M. Bever, Clearyl Davis, John E. Ellifritt, Cecil Fling, Francis D. Radcliff, Robert W. Robinson, Michael Shepher, Larry Williams, and Larry W. Griffin,

Defendants/appellants . . . . John D. Rockefeller, IV, Walter Gilbertson and Charles L. Miller,

Defendants. . . . . John Gum and Wilton Williams.

In addition to these parties, the United States of America appeared as amicus curiae in support of Governor Rockefeller's Petition for Rehearing in the court of appeals.

Furthermore, defendants/appellants Walter Gilbertson and Charles L. Miller are, by their separate counsel, filing a petition with this Court for a writ of certiorari with respect to their claims of immunity.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT	4
REASONS WHY WRIT SHOULD NOT ISSUE	22
CONCLUSION	58

TABLE OF AUTHORITIES

Bever v. Gilbertson,
724 F. 2d 1083 (4th Cir. 1983)..1, 24

Branti v. Finkel, 445 U.S. 507
(1980)..... 7

Cohen v. Beneficial Industrial Loan
Corp., 337 U.S. 541 (1949)...2, 3, 22

Coopers & Lybrand v. Livesay, 437
U.S. 463 (1978)..... 23

Evans v. Dillahunty, 711 F. 2d 828
(8th Cir. 1983)..... 51

Elrod v. Burns, 427 U.S. 347
(1976).....7, 50

Givhan v. Western Line Consol. School
Dist., 439 U.S. (1979)..... 43

Harlow v. Fitzgerald, 457 U.S. 800
(1982)..... 4

Jones v. Dodson, 727 F. 2d 1329 (4th
Cir. 1984)..... 45

Krohn v. United States, No. 83-1839
(August 22, 1984 - 1st Cir.)..... 51

McSurely v. McClelland, 679 F. 2d 309
(D.C. Cir. 1982)..... 50

Miller v. Board of Education of County
of Lincoln, 450 F. Supp. 106 (S.D.
W.Va. 1978)..... 48

Mt. Healthy Board of Education v. Doyle,
429 U.S. 274 (1977)..... 42

Nixon v. Fitzgerald, 457 U.S. 731 (1982)..... 23

Schever v. Rhodes, 416 U.S. 232 (1974)..... 8

Wren v. Jones, 635 F. 2d 1277 (7th Cir. 1980), cert. denied, 454 U.S. 832 (1981)..... 37

No. 83-2139

In the

SUPREME COURT OF THE UNITED STATES

October Term 1983

JOHN D. ROCKEFELLER IV, individually and as Governor of West Virginia,

Petitioner,

v.

JOHN M. BEVER, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Pursuant to the authority in Rule 22 and in the manner provided by Rules 33 and 34 of the Supreme Court rules, John

Bever, et al, request that this Court deny the petition on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

OPINIONS BELOW

The opinion of the court of appeals is reported as Bever vs. Gilbertson, 724 F.2d 1083 (4th Cir. 1983). However, the order denying petitioners' request for a rehearing with suggestion for rehearing en banc is not yet officially reported. The district court's opinion denying petitioners' motion for summary judgment is unpublished.

JURISDICTION

Petitioners depend for jurisdiction on the exception announced in Cohen vs.

Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) to the finality rule set out in 28 U.S.C. § 1291. Petitioners also claim jurisdiction to be based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents' claims, against which petitioner asserts qualified immunity, are brought under 42 U.S.C. §§ 1983 and 1985 and are based upon the First, Ninth and Fourteenth Amendments. The issue of appealability involves 28 U.S.C. § 1291. The question of employment authority in the West Virginia Department of Highways, which relates to the injunctive claims asserted against petitioner, is governed by W. Va. Code § 17-2A-4(1983). The texts of these constitutional statutory provisions are reprinted in Appendix

pages 87A-90A.

STATEMENT OF THE CASE

Petitioners seek review here of the refusal of the Fourth Circuit Court of Appeals to hear an appeal of the district court's denial of their motions for summary judgment based upon a claim of qualified immunity as outlined in Harlow vs. Fitzgerald, 457 U.S. 800 (1982). The court of appeals found it was without jurisdiction in the appeal since the interlocutory holding of the district court did not fall within the exceptions to the finality requirements of 28 U.S.C. § 1291 announced in Cohen vs. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949).

A. Respondents' claims and procedural history.

Respondents, all residents of

Doddridge County, West Virginia, are all former employees of the West Virginia Department of Highways who allege in their amended complaint, filed on March 28, 1983, that they were discharged by the petitioners in early and mid 1981 solely because of their political affiliation with the Republican Party.

Petitioner Rockefeller has been the Governor of West Virginia since January 1, 1977; Petitioner Miller was appointed by petitioner Rockefeller as his Commissioner of Highways in September, 1977; petitioner Gilbertson was appointed District Engineer for District 4 (which included Doddridge County) of the Department of Highways in November, 1977; defendant Gum was named (Doddridge) County Supervisor of the Department of Highways in July, 1977; and

defendant Williams was chairman of the Doddridge County Democratic Party executive committee throughout the setting of this action. All petitioners and defendants currently remain in the same positions as during the salient periods of 1981 recited in the pleadings.

Neither defendant Williams nor Gum is before this court. Gum was one of the summary movants but opted not to appeal the District Court's denial of his motion while Williams, not acting with official discretion, was not an immunity claimant.

These civil rights claims are stated in both the direct "knew or should have known" allegations as to petitioners, Rockefeller, Miller and Gilbertson as well as conspiracy claims as to all original defendants some of

whom are petitioners here. Further, the allegations charge petitioners had the power to prevent or aid in the prevention of the violation of respondents' rights but neglected or refused to act. The actions are founded in 42 USC §§1983 and 1985 with the predicate rights having been announced in Elrod vs. Burns, 427 U.S. 347 (1976) and Branti vs. Finkel, 445 U.S. 507 (1980).[1]

Petitioners Rockefeller, Miller, Gilbertson and Gum filed answers denying

---

[1] Petitioners' brief states the instant case is one of nine cases pending on the same issues of political patronage firing under the Rockefeller Administration. A number of these cases do not share the immunity issues raised here. Some have contended that the "fiscal" cutback by Rockefeller was contrived to gain the dismissal of plaintiffs thereby disguising the actual political reasons for terminiation by an invented fiscal crisis.

the factual allegations of Respondents (that they were fired because they were Republicans) and asserting a number of affirmative defenses including the common law "absolute immunity or (Miller, Gilbertson and Gum claimed "and") qualified immunity or both" based upon their assertions their acts were protected from liability inasmuch as each was acting in his respective official capacity as a state official.

These defenses of immunity became the subject of separate motions for summary judgement. Although the motions were entitled to suggest assertions of "official immunity", the content of both briefs properly characterized the defense as "qualified immunity" as most recently defined by Scheuer vs. Rhodes, 446 U.S. 232 (1974) and refined in

Harlow vs. Fitzgerald, supra. Any claim of "absolute immunity" or the "and/or" combination of both absolute and qualified immunity raised alternatively in the responsive pleadings was abandoned.

As a portion of the motions for summary judgement petitioners claimed that respondents were "laid off" because of "budgetary constraints" and that if political affiliation played a role in the decision to select these appellees for "lay-off" it was not the "sole" reason. By virtue of the multiple reasons for the "layoff", according to the summary judgment movants, an undiluted Elrod-Branti firing was not applicable to the termination of Respondents thus rendering the state of the law as not "clearly established". Such a state

of the law, at the time of petitioners' action, would thereby shield movants from liability for damages when exercising discretionary functions under the auspices of Harlow. Thus petitioners asserted that in a budget-inspired cutback the selection of respondents for termination soley because of their political party affifilation was constitutionally acceptable.

On July 21, 1983, the district court[2] denied the respective motions for summary judgment by a written opinion. App. p. 44-A. The court found that the law was "clearly

---

[2] Rockefeller's counsel asserted, in the memorandum in support of summary motion: "A literal reading of Elrod and Branti stongly suggests that the discharge of a public employee for political reasons is permissible, so long as it is not the sole

established" by virtue of the Elrod and Branti holdings and prohibited the

---

justification." "Given these facts (that plaintiffs' terminations were inevitable because of "fiscal necessity") and presupposing even that the selection of the plaintiffs for termination was politically tainted, the question thus arises as to the nature of the constitutional right allegedly abridged in the cases and, indeed, whether a constitutional right is implicated in these cases at all".

selection of respondents for dismissal because of their political affiliation regardless of the predicate basis for the decision to terminate "someone".

In the same opinion, the district court ruled on a motion which raised an issue repeatedly re-asserted in petitioners' briefs here: That petitioners, by their own self-serving affidavits, had no role in the selection of respondents for discharge whether or not political considerations were involved in that decision.

The district court found that such affirmative direct involvement was not a necessary ingredient in deciding the issue of § 1983 culpability as charged in the pleadings: "Defendants Gilbertson, Miller and Rockefeller challenge the complaint as insufficient

based on plaintiffs' alleged failure to aver an "affirmative link" indicating some personal involvement of these defendants in the acts complained of (selection for termination because of political party affiliation)." On this issue the district court found: "In the Fourth Circuit, such an affirmative link may be demonstrated through proof that a defendant 'knew or should have known' of the challenged practice, but evidenced deliberate indifference to plaintiffs' constitutional rights." App. p. 68A.

Further, the district court found that the affidavits and exhibits filed with the summary motion went "to the merits of the case" in an attempt to show petitioners' "good faith had been conclusively established, and that the

court may find as a matter of law that they are entited to judgment". Taken as a summary motion apart from the qualified immunity issue, the court denied motion since the record revealed genuine issues of fact.

After the district court denied requests for certification for immediate appeals as interlocutory orders under 28 U.S.C. 1292(b), petitioners filed notice of appeal and eventually secured, from Judge K. K. Hall of the Fourth Circuit, a stay of the impending trial as well as his finding that the district court's denial of the summary motion was an appealable order under Cohen.

The majority of a panel in the court of appeals reversed the single judge's decision and Judge Hall authored the dissent discussed so prominently in petitioners' briefs. An equally divided

vote of active justices in the circuit court caused the panel decision to stand and prompted this writ.

The court of appeals panel, in finding it had no jurisdiction under the Cohen exception, addressed only two of the four requisites set out for the characterization of the interlocutory order as appealable in Cohen. Since all four requirements must be present the failure of two defeated the Cohen application. Petitioners' brief somehow concludes that by not specifically ruling on two of the issues, they must have been decided in favor of petitioners.

The two Cohen ingredients were that since a trial on the merits must decide the issues for injunctive relief, which require the same proof as the damage claim, the qualified immunity

claim cannot save petitioners from a trial. But most importantly, the circuit court found also that the state of the law applicable to firing on the sole basis of party affiliation was not "unsettled" to a reasonable person when respondents were terminated.

Finding those two impediments to the Cohen exception, the court of appeals had to proceed no further to deny jurisdiction under the finality rule.

B. State of the record below.

Contrary to the assertions of petitioners' briefs, the record before the district court in deciding the motion for summary judgement included extensive discovery in the form of depositions and interrogatories. The court below considered this record, the affidavits of petitioners and argument

of counsel in deciding the motions.

Some specific recitations there include the following.

James Bowen, an Assistant Superintendent of the Doddridge County Unit of the West Virginia Department of Highways, testified in his evidentiary deposition that he personally informed Rockefeller of the harassment of employees affiliated with the Republican party and he further discussed that problem with one of Rockefeller's confidential aides. Bowen also testified that his father-in-law, Roncil Burton, now deceased, the then County Democratic Executive Committee Chairman in Doddridge County, met with Rockefeller and informed him of politically motivated harassment of Republican employees by defendant Gum. Bowen gave the same information to Miller and Gil-

bertson. Moreover, Gilbertson disclosed in his deposition that Department of Highways records reflect political clash causing defendant Gum to retaliate against respondent Bever by suspending and demoting him from his position.

Another deponent, Michael O' Brian, who is merely a private citizen of Doddridge County and unaffiliated with any party in this action, testified that he attended a public meeting conducted by Rockefeller at a small college during which he told Rockefeller that politics controlled the jobs and the roads in Doddridge County. Rockefeller refused to discuss that issue with him and summarily dismissed the complaint as a private matter. O'Brian then tried to telephone Rockefeller by placing a long distance call from the Department of Highways office in Doddridge County. He

was then informed of criminal prosecution for making the call and incurring the cost thereof on a state telephone bill.

Larry Swann, a member of the West Virginia legislature, and in fact, the leader of the minority Republican party testified on deposition that together with the same Roncil Burton he met with Governor Rockefeller at his office to tell him of the politically motivated harassment of Republican employees in Doddridge County by defendant Gum. Swann also testified that membership in the Doddridge County Democratic Executive Committee was necessary to obtain employment with the Department of Highways.

Rockefeller was named as a defendant in three previous civil rights actions alleging violations of the Elrod vs.

Burns in the Department of Highways. Each was filed and personal service was effected on Rockefeller as Court records indicated before the 1981 terminations occurred.

Yet, Rockefeller testified that he was not informed of the filing of these suits, and was not aware of the claims made until late 1981 when this deposition was taken in connection with one of those cases, but he had no office procedure to provide him with the substance of any suit.

Rockefeller also received other information from reliable individuals concerning terminations caused by political affiliation. One letter from a partner in the Charleston, West Virginia law firm which included Rockefeller's then counsel scolded that the political basis for firing bottom-

level employees was continuing.

Rockefeller responded to the Elrod decision by issuance of an executive order in November, 1978, and took no further acion to remedy politically motivated employment discrimination against Republicans which has occurred subsequent to that executive order and resulting in civil rights actions and letters to be written to the Governor concerning that discriminatory treatment.

Additionally, Department of Highway records developed in the discovery indicated that the Department's Equal Employment Opportunity Affairs Officer stated at meetings that the termination of employees in the 1981 terminations were politically motivated.

In addition to the above-described factual evidence, there is voluminous

factual evidence directed at defendant Gum, who made statements to plaintiffs and non-party witnesses of his animosity toward Republicans and his intention to terminate Republican affiliated employees. Further the plaintiffs have developed significant statistical evidence, as testified to on deposition by Dennis P. Bradly, Ph.D., who as a qualified expert witness in statistical analysis data in combined form and has determined that the termination rate of Republicans affiliated employees was 3.9 standard deviations higher than expected, a figure of significance, coupled with other direct testimony, in the determination of patronage dismissals.

REASONS WHY THE WRIT SHOULD NOT ISSUE.

I. The directives of the Cohen

case, allowing an appeal of of certain specified interlocutory orders as an exception to the finality rule, have not been met.

Petitioners allege that the denial by a clearly interlocutory order in the district court of their motions for summary judgment based upon the qualified immunity from damage claims, available to them as state officials, should be appealable here under the auspices of Cohen vs. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) and restated in Coopers & Lybrand Livesay, 437 U.S. 463 (1978). As recited in Nixon vs. Fitzgerald, 457 U.S. 731 (1982) the Cohen "collateral order" doctrine is:

". . . a small class of inter-

> locutory orders are immediately appealable to the courts of appeals. As defined by Cohen, this class embraces orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgement." As an additional requirement, Cohen established that a collateral appeal of an interlocutory order must "present a serious and unsettled question".

The Fourth Circuit Court of Appeals found the application of the Cohen rule failed in two of its four directives. Bever vs. Gilbertson, 724 F.2d 1083 (4th Cir. 1983). First, the rationale of the requirement of that interlocutory order must have decided an issue which would be "effectively unreivewable on appeal from final judgment". Stated conversely, if the issue is not appealable before final judgement any decision by an appellate body would be ineffective to accomplish the very

end of the asserted right - to prevent a trial at all.

Secondly, the court of appeals found that the decision of the district court did not involve a "serious and unsettled" question.

With two prerequisites of the Cohen rule unavailable to petitioners, the court of appeals did not address the remaining issues.

In deciding the first element, the court of appeals noted that the present action involved a claim for prospective injuctive relief against petitioners in their respective capacities as public officials requesting reinstatement and the prohibition of petitioners "from further violating the right and immunities guaranteed to (respondents) under the constitution". The redefining of qualified immunity in Harlow vs.

Fitzgerald, 457 U.S. 800 (1982) specifically limited qualifed immunity to "damage" claims and expressed "no view as to the condition in which injunctive or declarative relief might be available'. Thus the asserted immunity could not protect petitioners from a trial on the merits involving the very same substantive issues as in the proceeding for damages in petitioners individual capacities from which protection is sought, those issues involve the proof of patronage dismissal in violation of Elrod-Branti. Only the requested relief varied - damages arguably protected by qualified immunity and injunctive relief clearly not so protected.

Thus the court of appeals found that the prevention of petitioners participating in a trial on the merits

could not be effectuated by Harlow qualified immunity, and, thus, a denial by the district court of summary relief on that issue would not be rendered "effectively unreviewable on appeal from a final judgement". Since the trial of the injunctive relief would "hale" petitioners into court anyway, the issue of qualified immunity to damage claims aggainst the same persons in different hats could wait until final judgement.

The court found: "The trial must proceed in any event, and the question of qualified immunity is readily subject to appellate review after final judgement". App. p. 16A. Petitioners quote Judge Hall's dissent as raising the specter of qualifed immunity being effectively gutted by the majority's reasoning because artful pleaders will simply "tack on" a prayer for

injunctive relief thereby defeating the vitality of the immunity bar. App. p. 35A. The dissent apparently suggests the remedy that injunctive relief be abolished at least in § 1983 cases. There are sanctions to a pleader who would participate in such a "pernicious practice" can be accomplished less intrusively than the wholesale abolition of the jurisprudence supporting injunctive relief. Such a pleader must comport with Rule 11 of the Rules of Civil Procedure and its internal remedies, but, more importantly, the district court can inspect the basis for the injunctive relief as accomplished here, and dismiss such claims that are either facially without factual merit or that require relief not available against individual In the present case, the

district court found "all" of the petitioners to be proper parties to the injunctive claim. App. p.70A.

The court of appeals responded to the protestations in the dissent that only petitioner Miller should be a party defendant to the injunctive claim by pointing out that although petitioner Miller is specifically given authority in matters of employment in the Highways Department by statute, both he and his subordinate, petitioner Gilbertson, are in turn servants "at the will and pleasure" of petitioner Rockefeller. Thus, any injuctive relief to effectuate respondents asserted rights must include all petitioners. App. p. 11A N.1.

Thus the "effectively unreviewable on appeal" element of Cohen could not be met in the instant case. To alter that

element in the present case, this court must fashion some rememdy that would at once allow a trial with proper parties to an injunctive claim which shares identical issues with a damage claim which is to be prohibited by objective, good-faith, qualified immunity. An answer to such a dilemma not only does not seem ready or desireable.

Petitioners here could simply answer that having given themselves to public life they need never fear a court appearance for blatant wrong doing. That alteration certainly cannot fit this case.

The second element of the Cohen rule found to be wanting by the court of appeals was the failure of the interlocutory order to provide a "serious and unsettled question". App.p. 19A.

The court found that in 1981

respondents were clearly protected by Elrod-Branti from termination based solely upon political affiliation. App. p. 20A. The district court had easily reached the same conclusion. App. p. 73A. Thus the state of the law is not "unsettled" in 1981 (or now for that matter).

The Harlow case segmented the "good faith" qualified immunity into the "objective" element - whether the law applicable to the conduct was "clearly established" to a "reasonable person" at the time of the act - which standard, being devoid of any factual predicate and clearly an analysis of the state of the law at a given time, is given to summary decision.

Contrary to petitioners'claim,[3] the "subjective" element of qualified

---

[3] Capsulized, the Harlow qualified immunity holding finds: "For executive

(footnote 3 continued)

officials in general, however, our cases make plain that qualified immunity represents the norm. In (Scheuer) we acknowledged that high officials require greater protection than those with less complex discretionary responsibilities. Nonetheless, we held that a governor and his aides could receive the requisite protection from qualified or good-faith immunity" (S.Ct. p. 2733). Further developing qualified immunity, the court noted two "aspects" as "objective elements" which it says "involves a presumptive knowledge of and respect for basic unquestioned constitutional rights"; and "the subjective component refers to 'permissible intentions'". Noting the desirability of disposing of the defense by summary judgement and the impediment to that avenue provided by the "subjective component", the court held that the "objective test" will measure the validity of the defense on even a pre-discovery basis (S.Ct. p. 2738-2739).

"We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known". (cites omitted)

* * *

"Reliance on the objective reasonableness of an official's conduct as measured by reference to clearly established law, should avoid excessive disruption of government and permit the

(footnote 3 continued)

resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonable competent public official would know the law was governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew or should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily an objective factor."

immunity was not eleminated by Harlow since it involves a factual determination as to whether an official, as a not the "reasonable man", in fact, "knew or should have known the relevant legal standard".

In contending that the Cohen "serious and unsettled" requirement have been met here, petitioners claim first that since petitioners allege that "budgetary" considerations led to their decision to terminate some employees, they were entitled to select respondents for termination from the pool of employees based upon political affiliations since, from their perspective, it was not the "sole" consideration in the termination. Such contentions have punctuated petitioners'

briefs since the appealability of the summary denial first appeared to offer a pre-trial appeal. Interestingly, none of the petitioners have ever claimed in their affidavits or depositions that the directives of Elrod-Branti were not fully known and specifically applied here. In fact petitioner Rockefeller specifically acknowledged in his deposition (taken after the ban on discovery as per Harlow) that "even" allowing political affiliation to "play any part at all in determining who is to be laid off or terminated at any time" was "not to be considered proper".

All petitioners have similarly claimed adherence to Elrod-Branti as the district court found in the record below. App. p. 74A. Thus all had actual knowledge of the legal impediments to using political affiliation as an

ingredient in selecting respondents for termination. Only the allegations of counsel in brief are the contrary.

With actual knowledge, petitioners can't even escape to the "reasonable man" refuge. As outlined in the first concurring opinion in Harlow by Justice Brennan and joined by Justice Blackmun and Justice Marshall and the majority writer, Justice Powell:

> "I agree with the substantive standard announced by the Court today, imposing liability when a public-official defendant "knew or should have known" of the constitutionally violative effect of his ctions. Ante, at 2737, 2739. This standard would not allow the official who actually knows that he was violating the law to escape liability for his actions, even if he could not "reasonably have been expected" to know what he actually did know. Thus the clever and unusually well-informed violator of constitutional rights will not evade just punishment for his crimes. I also agree that this standard applies "across the board" to all "government officials performing discretionary functions."

Like the dissent in the court of appeals, petitioners cite Wren vs. Jones, 635 F.2d 1277 cert. denied as being in petitioner Rockefeller's words "far more akin to petitioners' situation than either Elrod or Branti". In fact he takes the somewhat curious position that "contrary to what the Fourth Circuit suggested in its opinion below, this is simply not an Elrod or a Branti case." This statement apparently stems from a preception some factual disparity of the present case from those holdings and ignore the wide-sweeping constitutional interpretation of those decisions.

The Court of appeals decision dismissed the dissent's reliance on Wren as being "nothing like" the present case since political affiliation was not

even a factor.[4]

As the only circuit court case cited in support of this threshold "unsettled" proposition, Wren is a per curiam opinion which admits by its own language to being "unique" (p. 1283).[5] Note may be taken as to its date and unsuccessful appeal in determining its applicability to petitioners' assertions of an unclear and unsettled state of the law when they fired appellees in February and June, 1981.

As a supposed fiscal "independent justification" case which is to unsettle Elrod-Branti, Wren requires close scrutiny for its application to the

---

[4] In briefs below petitioners cited many cases for this proposition none of which stood for the "independent justification" theory proposed by petitioners and all decided after the acts complained of" here.

[5] The opinion appeared in the advance

instant case. From a full trial record, the facts revealed are that, as per Illinois tradition, when Democrat Governor Shapiro prepared to leave office in November, 1968, he extended civil service coverage to the Department of highways and the Department of Mental Health insure his patronage democrats would be job secure when the Republican governor-elect Oglivie took office in January, 1969. However, when Oglivie took office he "expunged" Shapiro's civil service maneuver, and replaced the Shapiro democrats with Oglivie republicans. Twenty-five of those replaced by Ogivie filed a §1983 action entitled the Bradley case. While this case was pending, in November 1972

---

sheets February 23, 1981 and in the bound volume May 3, 1981. The denial of cert. dated March 3, 1981, appeared in the advance sheets December 15, 1981, and has not yet been published in a bound volume.

Oglivie tried to freeze his Republican patronage employees by the same civil service declaration tried by his predecessor. The reason, of course, was that a Democrat, Walker, had been elected governor and was due to take office in January, 1973. With Democrat Walker in office, the Bradley case was tried and plaintiffs there were ordered reinstated in April, 1973. An order entered in May, 1973 threatened contempt for failure to abide by the opinion's directive of reinstatement.

Shortly thereafter, "financial restrictions" prompted the layoff of 540 highway workers. So, highway officials were "confronted with the specter of having 50 employees to do work formerly performed by 25 employees" during a time others were being laid off because of fiscal short-fall (the current euphemism

for being broke).

With that the highway officials devised the means of "selecting those employees for 'lay-off'" (p. 1280). All of the workers in both the Highway Department and the Mental Health Department were Oglivie-placed Republicans including Wren and the other plaintiffs. Therefore there was no element of partisan selection (totally unlike the instant case) as noted (p. 1286):

> "The fact that all potentially affected employees were Republicans means that the Wren plaintiff's political association was of no consequence. . ."

Even without party affiliation a factor, the "selection" process for the "lay-off" implementation of the Bradley reinstatement order was objective. Those workers who actually had replaced the Bradley workers were first

identified - this produced fifteen slots. When those who had displaced workers who had actually replaced Bradley employees were identified, this produced another six slots in the Highway Department the remaining four slots "could not be identified precisely (therefore) persons were laid off on a random basis". The single employee in the Mental Health Department was selected by means stated as "the last person hired was laid-off" (p. 1280).

Modestly characterized as "unique" and "unusual" the district court there addressed the facts of this sort of double Elrod case by applying the procedure set out in Mt. Healthy Board of Education vs. Doyle, 429 U.S. 274 (1977) to a full trial (p. 1283) and ordered reinstatement of the Wren plaintiffs with damages assessed.[6]

---

[6] Restating the Mt. Healthy holding,

(footnote 6 continued)

the district court here stated: "The Mt. Healthy test, reaffirmed in Givhan vs. Western Line Consol. School Dist., 439 U.S. (1979), provides that, once plaintiff has satisfied his prima facie burden of demonstrating (1) that his conduct was constitutionally protected, and (2) that his conduct was an "unsubstantial" or "motivating" factor in the decision to terminate him, then defendant must prove by a preponderance of the evidence that the same employment decision would have been reached as to plaintiff even in the absence of the protected conduct, i.e., that plaintiffs' political affiliation was not the "sole cause" of his termination."

> "Under Givhan (first phase) the initial burden is upon plaintiffs to show that their conduct was constitutionally protected. Plaintiffs must next establish that this conduct was a "substantial factor" or a "motivating factor" in defendants' decision to discharge them from the Highway Authority."
>
> "If that is proven, (second phase) the defendants have the burden to show by a preponderance of the evidence that they would have reached the same decision notwithstanding the protected conduct. If the plaintiffs are to recover, the court (or jury) must expressly find that plaintiffs would not have been discharged "but for" the constitutionally immunized activity."

On review the Wren panel again applied the Mt. HealthyGivhan two-phased burden shifting rule (p. 1285-1286):

The Court justifiably found that upon review of all the evidence (not on pretrial hypothesized facts as here) that the Wren plaintiffs had not satisfied that portion of the first phase demanding the prima facie burden that "political affiliation was the motivating factor in their discharge". (p. 1286)

Yet, as it is apparently the habit of courts in these §1983 cases, the court went on to "assume arguendo, that plaintiffs have satisfied the first part of the Mt. Healthy test, we find that the defendants have, by a preponderance of the evidence, established that fiscal restraints required a reduction in the affected units equivalent to the number

of reinstated Bradley employees . . ."

This holding, then, instead of revealing the state of the Elrod-Branti holdings as being not "clearly established" by the introduction of an "independent justification", clearly and specifically holds that the law clearly placed that "independent justification" in the defendants' quiver for use in rebutting plaintiffs' prima facie case if that initial burden is met.

Petitioners also cite Jones v. Dodson, 727 F.2d 1329 (4th Cir. 1984) for the proposition that the Elrod-Branti dictates are "neither clear nor clearly established", and, surely, "unsettled" for Cohen. General language is quoted indicating that in employee discharge issues involving "first amendement" expressions

"controlling doctrine - both substantive and procedural - is still evolving and by no means yet authortatively settled." However, any reading of the specifics of the decision reveals a clear state of the law which not only acknowledges Elrod-Branti rights but confirms that the procedure appropraite for determining any challenge to the "sole" cause issue is the Mt. Healthy matrix for the reception and sorting of facts. The decision first announces the undiluted right announced in Elrod-Branti, then the method of resolution of "unrelated" reasons for discharge:

> "Third, neither may a public employee be discharged solely because of the employee's political party affiliation, unless the employer can show that affiliation with the employer's party is essential to the employee's effectiveness in carrying out the responsibilities of the position held. Citation to Elrod and Branti.
>
> Fourth, notwithstanding proof

(or concession) that a public employee's discharge was based at least in part upon over expressive conduct, party affiliation, or both, an employer may yet avoid liability for violation of protected first amendment rights by proving that the

discharge would have ben made in any event for reasons unrelated to any exercise of protected first amendment rights. The burden to prove this avoidance defense is upon the employer." (citation omitted).

A footnote to this passage focuses even more clearly:

"Although the impermissible motive in Mt. Healthy itself was overt expressive conduct, we agree with those courts that have applied the principle as well to party affiliation cases. The Mt. Healthy procedure for sorting out mixed motives fairly accommodates the reality that in practically any party affiliation discharge situation some unrelated reason may also be advanced by the employer. By applying the Mt. Healthy proof scheme, the critical issue whether a discharge was solely for party affiliation reasons can be fairly addressed. If the employer does not carry its burden of providing that the discharge would have occurred irrespective of party affiliation, it can safely be taken that party affiliation was effectively the only reason." (citations omitted)

Jones then properly places a challenge to the Elrod-Branti "sole" cause in the proper role - as an ingredient in the defendant's proof scheme under Mt. Healthy - not as emasculating a clearly established right. In West Virginia the district court below in the present case had found the exact same role of a so-called independent justification in Miller -----vs. Board of Education of County of Lincoln, 450 F. Supp. 106 (S.D. W.Va 1978).

The "serious and unsettled" element of Cohen has not been met here. Instead it has been shown that it is "settled" that the state of the law was "clearly established" in early and mid 1981 that the sole basis for discharging a public, non-policy making employee could not be political affiliation. The court

of appeals - here properly cast the supposed "budgetary reasons" for the decision to terminate some employees as being "only a backdrop. It did not identify those employees to be terminated or those to be retained. It only set the stage for those specific employment decisions which would identify those employees who were released and would effect their actual terminations. The Elrod-Branti principle fully protected all of the lower echelon employees of the Department as their superiors approached the task of implementation of the reduction in force". App.p. 20A-21A.

This recitation of the lucid application of simple constitutional rights is not repelled by any decision

or force of reason advanced by petitioners. They are reduced to charging that respondents' claims are "unsubstantial" from a "factual standpoint" on "this alone ought to be sufficient to warrant a conclusion that petitioners' appeal presents a serious and unsettled question". (Rockefeller brief p. 18). Having failed the showing of "serious and unsettled" petitioners invite a factual analysis not contemplated by either the Cohen element or the Harlow objective "good faith" qualified immunity, an issue discussed below in this brief.

As stated by petitioners, McSurely vs. McCelland, 679 F.2d 309 (D.C. Cir. 1982) found that Harlow had "jettisoned the subjective, fact oriented element of qualified immunity and vest the doctrine in terms of objective good

faith."

Actually the subjective element was simply delayed to a trial by the Harlow holding; nevertheless, McSurely held that this new objective good faith" qualified immunity was on a par with absolute immunity which has been repeatedly held immediately appealable. No discussion was had as to the elements of Cohen so an analysis of those factors is unavailable. Evans vs. Dillahunty, 711 F.2d 828 (8th Cir. 1983) is cited for added strength of another circuit to the McSurely proposition, but that opinion rejected McSurely and found "an evidentiary showing" was necessary if the facts are in dispute - a sitution clearly not applicable to the instant case. Since petitioners' brief was filed Krohn vs. United States, No. 83-1839 (August 22, 1984 - 1st Cir.) has followed the McSurely holding.

These cases simply conlude that the qualified immunity is immediately appealable in various circumstances, and base that on no holdings or rationale from this court.

II. Whether the approval of a reduction-in-force in state government for valid budgetary reasons contravenes any clearly estaablished right of public employees under Elrod vs. Burns, 427 U.S. 347 (1976) and Branti vs. Finkel, 445 U.S. 507 (1980), not to be terminated solely on the basis of politics.

This issue suggested by petitioners would require a finding of fact here and a disposition of this case on the merits. Such an exercise is starkly

at odds with the "objective" standard for qualified immunity set out in Harlow as well as the second element of Cohen. This element prohibits immediate appeal of an issue that is not "separate from the merits of the action". The whole point of the Harlow objective test is the avoidance of disputed questions of fact which cannot be decided in a summary judgment motion. Harlow p. 900.

Petitioner Rockefeller typifies this misunderstanding of the elementary rules of Harlow and Cohen as well as Rule 56 of the Rules of Civil Procedure in insisting that: "The test for determining petitioners' entitlement to immunity is not simply whether respondents, as public employees, had certain identifiable constitutional rights in 1981, such as the right not

to be fired based solely on politics. Rather, the test is whethr petitioners' conduct can be said to have violated or abridged any such clearly established rights of these respondents".
(petitioner Rockefeller's brief p. 21)

Both briefs pronounce the innocence of petitioners of any role in patronage dismissals on every page, invariably citing only their affidavits filed in support of their summary motions below and ignoring the remainder of the record.[7]

"Motivation" is somehow found to be an ingredient of Harlow's objective qualified immunity. (petitioner Rockefeller's brief p. 2)

Harlow anticipted the determination of the state of the law revealed to a

---

[7] The terms of Rule 56 itself require

reasonable person[8] at a time when "alleged violations" occurred. See Justice Brennan's concurring opinion joined by Justice Marshall and Justice Blackmun as well as the majority writer, Justice Powell. Harlow p. 813.

In order to effectuate the objective standard of Harlow no competency factual allegations could be considered as petitioners urge. Instead the inquiry must be to state of the law applied to the facts alleged. It must be assumed that the facts would be in contest

---

an analysis of "the pleadings, depositions, answers to interrogatories and admissions on file", and the court must look at this "record in the light most favorable to the party opposing the motion. See Harlow p. 900, N. 26.

---

[8] Or, as here, actually known to petitioners.

during a trial but the purpose of Harlow's objective appraisal is to avoid the variable of uncertain factual setting. Pled allegations then become the factual predicate to assess the immunity issue.

The Court of appeals in the present case recognized this proposition in stating: If, in the implementation of a reduction in force, those employees to be released are selected not on the basis of the quality of their work, their productivity or their faithful-ness to their jobs but solely on the basis of their political affiliations the Elrod-Branti principle is clearly applicable. The plaintiffs' allegations bring them readily within the principle. App. p. 22A.

The Court of appeals in the present case recognized this proposition in stating: If, in the implementation of a reduction in force, those employees to be released are selected not on the basis of the quality of their work, their productivity or their faithfulness to their jobs but solely on the basis of their political affiliations the Elrod-Branti principle is clearly applicable. The plaintiffs' allegations bring them readily within the principle. App. p. 22A. (emphasis supplied)

CONCLUSION

Much of petitioners' brief deals with the social costs and financial burdens to public officials in defending actions against them, and the necessity of curbing the practice.

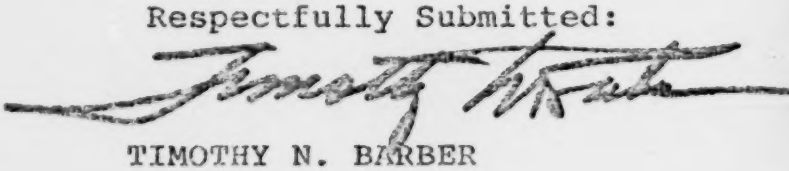
Little has been said about the costs to the lowest order of laborers in the West Virginia Department of Highways who lost their jobs because they exercised a basic freedom. They have not benefitted by a panel of lawyers from both the public and private sector using the court system as a tactical tool to delay answering the allegations presented before a trial court and jury.

These social costs have all been incurred because petitioners wish to delay a trial. That fact was recognized by the court of appeals below (App. p.

In addition to decrying the imposition of law suits on public officials, Harlow also found that damage actions against high officials are "an important means of indicating constitutional guarantees".

The respondents' rights here were clearly established and their redress should not wait for another series of hearings and appeals for the various levels of the judicary to pass on what is clearly "settled".

Respectfully Submitted:



TIMOTHY N. BARBER